Committee on Improving Jury Service

Final Report to the Utah Supreme Court and Utah Judicial Council

Final Report of the Committee on Improving Jury Service

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The Honorable Richard C. Howe
Chief Justice, Utah Supreme Court
Chairman, Utah Judicial Council

Dear Chief Justice Howe:

The work of the Committee on Improving Jury Service emphasizes education. We recommend changes to statutes and rules that will significantly improve the environment in which jurors work and the decisions they

make, but our investigation has shown that Utah's jury system is well-administered, conforms almost completely to the ABA Standards Relating to Jury Use and Management and already contains sufficient discretion in judges to permit many of the innovations developed by jury studies in other states. Continuing education, therefore, is the key to putting into practice the recommended changes as well as the discretion judges already enjoy. To this end, much of the discussion on any particular procedure is designed to reflect, for the benefit of judges and lawyers, best practices in implementing that procedure. We encourage the organs of the judiciary and of the Utah State Bar to include in conferences and classrooms the topics developed in this report. The report itself, with appropriate amendments, should be reduced to a section of the judges' bench book, and its principles should be included in new judge orientation.

Education is also the key to improving the public's perception of jury trials. To this end, we recommend local bar associations and judges work together to prepare and deliver presentations in their communities about the role of law in a republican government and the role of jury trials within the law. We encourage the Board of District Court Judges and the Board of Justice Court Judges to assist in this effort to reach not only adult members of the community but school-age children as well. The most important audience may be those young citizens who are just now coming of age and those who will qualify for jury service in another five years. Committee members, working with the Bar and the Administrative Office of the Courts, have initiated discussions with the State Board of Higher Education to include the role of law and jury trials within the curriculum of university education departments so that we might teach the teachers who will teach our children.

And education is the key to improving the experience of jury service itself: to improve the orientation of jurors and so better educate them about the trial process and their responsibilities within that framework; and to incorporate into the courtroom the adult education techniques of the classroom and so better educate jurors about the case at hand. Jurors need to be much more than mute observers of a mystical ceremony. The actions of jurors must be controlled by the rules of law just as the actions of judges and lawyers are controlled, but experience has shown that an active role for jurors is an appropriate role.

Many of these recommendations are couched in terms of challenges and encouragement, suggestions and discretion. This is not soft language indicative of a failure to reach consensus on anything stronger. This is the collective opinion of the Committee that, in some areas, there is no uniform best practice but rather a variety of good practices. In the body of the report we state that, if jurors are conscientious and deliberative, they will reach the correct result regardless of the outcome. Similarly, if judges and lawyers guide their discretion by the principle of respect for jurors as peers, as colleagues and as responsible representatives of the community, they will improve the service of those jurors and the outcome of the trial without regard to the recommendations of this Committee.

The old saw "the more you know, the more you know you don't know" applies to this Committee. Our work is not done, but we are not the group to continue the effort. Throughout the report we refer to the need for more research, further development, continuing education, and oversight. We recommend a standing committee of the Judicial Council to monitor jury use, to maintain current research on jury management, to research and respond to the opinions of jurors, and to assist with continuing education.

Many of the recommendations can be implemented without any cost, but many others are certain to cost money. In only one area, a new data entry technician for gathering demographic information about jurors and measuring juror yield, has the Committee recommended a particular implementation plan with a new position and all of its attendant costs. For the remainder of the recommendations, the nature and amount of the expenses are be affected by unknowns. The Committee believes its recommendations to represent sound policy and urges the Judicial Council and Supreme Court to determine and provide for the expenses of implementation as they occur. Developing budgets as well as funding sources for these proposal is an appropriate responsibility for a standing committee.

This Committee, without exception or qualification, represents the finest example of deliberative decision making that we have ever experienced. We would like to express to the Committee's members and staff our appreciation for their time, their dedication and their tireless effort.

Respectfully submitted,

Christine M. Durham
Justice, Utah Supreme Court
Committee Co-chair

William A. Thorne, Jr.
Judge, Third District Court
Committee Co-Chair

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TABLE OF CONTENTS

SUMMARY OF RECOMMENDATIONS

Existing public education efforts of the judiciary should be modified to include jury service as a topic – among others – when judges meet with community groups. Speaking points might include:

- the democratic role of the jury as the collective community conscience;
- the care taken in selecting impartial jurors;
- the extent to which the courts can protect the privacy of jurors;
- the efforts in Utah to treat jurors as knowledgeable and responsible adult decision-makers;
- the efforts of the court to accommodate special scheduling needs of jurors; and
- a realistic appraisal of the burdens – and the rewards – of jury service..... 12

The judiciary and the Bar should work with local schools and school boards to include jury trials as a component of the school curriculum. The Committee encourages judges and lawyers to prepare elementary, middle and high school presentations. Lawyers should receive CLE credit for presentations. Trial court judges should identify elementary, middle and high school teachers on their jury panels and assist those teachers in presenting their jury experience to their students. The American Board of Trial Advocates has produced a speaker's guide, video, and interactive CD for this age group, which may serve as an aid and which are available through the Administrative Office of the Courts.... 12

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questionnaire, should explain the grounds and procedures for requesting to be excused from jury service. The court should notify jurors whether they qualify for jury service and whether a request to be excused is granted. The summons should advise jurors not just when and where to report, but also

- ➢ to arrange for the care of dependents,
- ➢ to arrange for time away from work,
- ➢ where to park, and
- ➢ what to expect when they arrive..... 13

Approved jury forms and the jury orientation video should be uniformly used throughout the state..... 13

The judge should advise jurors of the purposes of voir dire and of removing jurors for cause or by peremptory challenge. The judge should advise jurors of the expected trial schedule and the causes of delays. If a trial settles without calling jurors to the courtroom, the judge should meet with jurors to explain what has happened and the importance of their presence. After trial the judge should advise jurors of their rights and express sincere appreciation for their time and for their verdict. The judge cannot comment upon the case; nor can the judge commend or criticize the verdict. But judges should, within the limits of the Code of Judicial Conduct, answer jurors' questions. Above all, no juror should go home feeling frustrated or unappreciated. Jurors must be treated with respect. Jurors are interrupting their lives for the benefit of the court and the litigants and should be shown every courtesy and respect. Each court should develop a program for involving judges in orienting jurors before, during and after the trial..... 13

The Administrative Office of the Courts, perhaps through the Tribal-State-Federal Court Forum, should initiate discussions with tribes around the state with the objective of duplicating in other counties the success experienced in San Juan County. The Committee recommends that the Administrative Office of the Courts investigate the feasibility of:

- ➢ using Social Security Administration records, Tax Commission records and/or public assistance records as source lists of jurors;
- ➢ using U.S. Postal Service records either as a source list of jurors or as a source of information with which to confirm addresses obtained from other lists;
- ➢ using information from the Bureau of Vital Records as a source of information with which to remove the names of deceased persons from the master jury list and to update names due to marriage, divorce or judicial decree; and
- ➢ purchasing software, to integrate with jury management software, with improved logic for identifying duplicate records of individuals..... 16

The courts should provide, in a discreet manner so as to avoid possible embarrassment, all reasonable accommodations for jurors with disabilities as required by the Americans with Disabilities Act, such as TTY and sign language interpreters for those jurors who need such services. If a person with a disability employs a personal assistant, the assistant should be permitted to accompany and assist the juror during trial and deliberations but should not otherwise participate in the trial or deliberations. The Supreme Court should approve an appropriate oath for the assistant to ensure the full participation of the juror, not the assistant, in the trial and deliberations..... 18

Courts that have already arranged with the county Sheriff to serve summonses upon jurors should continue to do so. It is likely that practice has built a culture of responding to mailed summonses. Courts that do not issue summonses for personal service should carefully consider building such a practice at a measured pace. Ultimately, the objective should be not the punishment of reluctant jurors, but encouraging jurors to respond initially..... 19

The judiciary should routinely measure juror yield – the ratio of jurors needed to jurors called – to gauge the level of compliance with notices as well as better estimate the optimum size of jury panels..... 19

Courts should consider developing guidelines for temporarily excusing a juror from service to accommodate the juror's schedule. Routine work and school schedules may be difficult to accommodate because nearly all jurors

In determining challenges for cause, the task of the judge is to find the proper balance. It is not the judge's duty to seat a jury from a too-small venire panel or to seat a jury as quickly as possible. Although thorough questioning of a juror to determine the existence, nature and extent of a bias is appropriate, it is not the judge's duty to extract the "right" answer from or to "rehabilitate" a juror. The judge should accept honest answers to understood questions and, based on that evidence, make the sometimes difficult decision to seat only those

FINAL REPORT OF THE COMMITTEE ON IMPROVING JURY SERVICE

1) INTRODUCTION

¶1 In April 1997 the Supreme Court and the Judicial Council jointly appointed the Committee on Improving Jury Service. The number of issues related to jury service is large and the variety broad and the charge to the Committee was correspondingly broad. To begin its work the Committee prepared an exhaustive summary of topics for investigation. In its three years of work, the Committee was able to reach most of those topics, but not all. This report contains the Committee's recommendations and part of the rationale for those recommendations.

¶2 This report identifies the need for improvements, but, generally, the Committee found the Utah jury system to be sound and well-administered and to contain many of the features of the ABA Standards Relating to Jury Use and Management and of innovations developed by similar jury improvement efforts in other states. The Committee recommends a legislative proposal for 2001, which, although small in size, will have significant effect. The Committee's proposed rule changes are more voluminous and strive to achieve reforms at a measured pace.

¶3 The Committee's research included considerable input from a variety of outside resources. The Committee considered many law review articles, books, studies and appellate court cases on juries and jury management. The Committee investigated national standards on jury practices, the recommendations of jury improvement projects of other states and the practices of other states. The Committee considered the arguments and conclusions of lawyers, judges, clerks, educators, media representatives and court administrators.

¶4 The Committee's principal focus, in keeping with its charge to "keep attorneys and judges informed of [the Committee's] work," is education. During the course of this study Committee members organized and participated in classes for judges and lawyers on many of the topics that follow, and continuing this education effort may be the most important feature of improving jury service. Occasionally in its research the Committee discovered what at first appeared a monolithic practice but which was actually more varied, and the Committee's effort to advise judges and lawyers of practices permitted under existing law and allowed in some courtrooms resulted in other judges adopting that practice. Modifying the law in some areas may be necessary, but it will not be sufficient. Continuing to educate lawyers and judges of required and discretionary practices is also required.

2) EDUCATION

¶5 Education of judges and lawyers is a theme repeated throughout this report. The Committee recommends education programs for jurors and for the general public as well.

A) PUBLIC EDUCATION AND OUTREACH

¶6 In recent years both the judiciary and the Bar have expanded their efforts at educating the public about the courts and the law. Law Day activities, speakers' bureaus, "meet the judges night" and other efforts to bring the courts to the community and to inform the public of the role of law in our republic need the support and participation of judges. Judges can contribute by personally volunteering, within the limits of the Code of Judicial Conduct, to meet with community groups. The judiciary can contribute by organizing programs, coordinating its programs with those other organizations, and providing technical assistance such as exhibits, slide shows and videos. The conduit for delivering the message of the importance of jury service is already

established, and the message about jury service need not be the exclusive or even the primary theme of a program.

¶7 Existing public education efforts of the judiciary should be modified to include jury service as a topic – among others – when judges meet with community groups. Speaking points might include:

- ➢ the democratic role of the jury as the collective community conscience;
- ➢ the care taken in selecting impartial jurors;
- ➢ the extent to which the courts can protect the privacy of jurors;
- ➢ the efforts in Utah to treat jurors as knowledgeable and responsible adult decision-makers;
- ➢ the efforts of the court to accommodate special scheduling needs of jurors; and
- ➢ a realistic appraisal of the burdens – and the rewards – of jury service.

¶8 The Administrative Office of the Courts has already produced an award-winning video for the purpose of orienting jurors at their first appearance. This video would also serve well for public education purposes. Any number of cartoons taking a well-aimed poke at jury duty appear on the comics pages of newspapers and magazines, and these can both lighten the message and focus its point.

¶9 As important as it is to reach adults, so much greater is the importance of reaching those who will qualify for jury service in five to ten years. Middle school students and older elementary school students are not too young to learn the principles of republican governance and the role of the courts and of the jury within that structure.

¶10 The judiciary and the Bar should work with local schools and school boards to include jury trials as a component of the school curriculum. The Committee encourages judges and lawyers to prepare elementary, middle and high school presentations. Lawyers should receive CLE credit for presentations. Trial court judges should identify elementary, middle and high school teachers on their jury panels and assist those teachers in presenting their jury experience to their students. The American Board of Trial Advocates has produced a speaker's guide, video, and interactive CD for this age group, which may serve as an aid and which are available through the Administrative Office of the Courts.

¶11 The judiciary and the Bar should work with the education departments of universities to include the role of the law, the courts and jury trials within the curriculum of those who will teach our children in the future.

¶12 The Board of District Court Judges, the Board of Justice Court Judges and the Committee on Judicial Outreach should work together and with judges to develop a program for involving judges in public education and outreach. Local Bar associations should recruit and coordinate volunteer lawyers. A jury trial is an evaluation of evidence by representatives of the community. The most effective public education starts not with state-wide efforts, but with the community.

B) JUROR ORIENTATION

¶13 What for judges, lawyers and court staff is a routine occurrence is for jurors a rare, perhaps once-in-a-lifetime event. Jurors therefore need to be educated about jury service in general and about the case they are expected to try, not only to improve their ultimate decision, but also to alleviate the inevitable stress of an unfamiliar experience.

¶14 To be effective, orientation information must be timely. The initial mailing to the juror, usually the qualification questionnaire, should explain the grounds and procedures for requesting to be excused from jury service. The court should notify jurors whether they qualify for jury service and whether a request to be excused is granted. The summons should advise jurors not just when and where to report, but also

- ➢ to arrange for the care of dependents,
- ➢ to arrange for time away from work,

- where to park, and
- what to expect when they arrive.

¶15 Committee staff, in consultation with jury clerks around the state, have developed in clear, simple language a qualification form and cover letter that explain the process of being excused from jury service and a summons form that contains information necessary to the juror. The Administrative Office of the Courts has developed an award-winning video introduction to jury service, and yet the video is not being shown in all counties. Approved jury forms and the jury orientation video should be uniformly used throughout the state.

¶16 Once jurors arrive at the courthouse and throughout their stay, judges should play a central role in all phases of orientation. Practices vary, but judges, especially in urban and multi-judge courts, seldom welcome the venire panel to the courthouse. The jury clerks do an admirable job of making jurors feel welcome, but the public will note and appreciate that message from a judge. Some jurors come to the courthouse with a good deal of skepticism and cynicism, and one of the first persons the jurors see should be a judge, not necessarily the judge who will try the case.

¶17 From all reports, judges already take care to orient jurors in the courtroom. The judge should advise jurors of the purposes of voir dire and of removing jurors for cause or by peremptory challenge. The judge should advise jurors of the expected trial schedule and the causes of delays. If a trial settles without calling jurors to the courtroom, the judge should meet with jurors to explain what has happened and the importance of their presence. After trial the judge should advise jurors of their rights and express sincere appreciation for their time and for their verdict. The judge cannot comment upon the case; nor can the judge commend or criticize the verdict. But judges should, within the limits of the Code of Judicial Conduct, answer jurors' questions. Above all, no juror should go home feeling frustrated or unappreciated. Jurors must be treated with respect. Jurors are interrupting their lives for the benefit of the court and the litigants and should be shown every courtesy and respect. Each court should develop a program for involving judges in orienting jurors before, during and after the trial.

C) JUDGE AND LAWYER EDUCATION

¶18 The Committee recommends the Board of Bar Commissioners, the sections and committees of the Bar and individual lawyers include jury topics at bar conferences and other CLE venues. The Judicial Council and the Administrative Office of the Courts should include jury trials and the information and principles in this report as part of the new-judge orientation and as a recurring feature at judicial conferences.

¶19 Some of the topics presented in this report include specific education recommendations, but even those without such attention deserve it. Without continuing education about alternative practices and best practices, people tend to rely on conventional practices, which serve, but should not serve as the high water mark. The Committee emphasizes continuing education. Lawyers and judges come and go. Some who want to attend a course cannot. Lessons once learned are forgotten. Innovations atrophy from lack of use. The education effort must continue over time. Among the venues identified by the Committee are: annual and spring judicial conferences; annual and mid-winter Bar conferences; specialized CLE courses; and American Inns of Court.

3) JURY SELECTION

A) JURY SOURCE LISTS

I) IMPROVING THE EXISTING LISTS

¶20 Within the last year, the Administrative Office of the Courts has made significant improvements in the quality of the data in the master jury list. The nature of the problems these improvements were designed to address is such that the problems likely can never be eliminated, but the steps already taken and those recommended in this report can go a long way in reducing the frequency of the problems and the resulting cost.

¶21 Since 1992, the courts have used the voter registration lists of the 29 counties and the list of drivers licenses and identification cards as the sources for building the master jury list. In 1998, the judiciary added the tribal roll of the Navajo Nation as a third source list for San Juan County. In 1999, the courts first obtained the voter registration list from the consolidated list of the Lt. Governor rather than from the several county clerks. To build the master jury list from which jury clerks randomly draw names for qualification, the Administrative Office of the Courts merges the source lists and eliminates duplicate records of an individual. The computer determines a duplicate record exists if the name and date of birth on a pair of records within a county match. A missing date of birth is treated as a match. Every six months, the AOC obtains a new set of source lists and compares them with the existing master list. Any names added to the source lists during that six-month interim are added to the master jury list.

¶22 All of the problems identified by jury clerks, computer programmers and others involved in the qualification process are caused by only two problems: duplicate records and bad data, the latter being by far the more troublesome.

¶23 A duplicate record for a person exists if the person is identified on the source lists by more than one name or date of birth. There are three causes for a person to be listed by more than one name or date of birth:

- ➢ Clerical error. A clerk misspells the name on one of the lists or enters an incorrect date of birth. (A matched name with a missing date of birth is treated as a match.)
- ➢ Variation of name. A person uses one name in registering to vote and a variation of that name (e.g., no middle initial, first initial – middle name, or diminutive name) in obtaining a driver's license.
- ➢ Name change. A person changes his or her name through marriage, divorce, or court process.

¶24 There are some misperceptions about the causes of duplicate records. The following do not contribute to duplicate records:

- ➢ Different addresses. As originally programmed, the computer compared addresses and required a match, but this instruction was changed several years ago.
- ➢ Capitalization and punctuation. The computer does not distinguish records based on capitalization or punctuation.

¶25 To address the problem of duplicate records, computer programmers have improved the logic by which the computer matches records. Although this change will assist in identifying duplicate records caused by misspelled names and variations of a name, the problem of duplicate records can never be eliminated. Variations on names and legitimate name changes are simply too numerous.

¶26 Incorrect addresses, including persons who have moved out of the county, is the most frequently occurring example of bad data. Court clerks estimate that about 50% of qualification questionnaires are returned because of incorrect addresses. This represents a significant mailing cost as well as cost in clerical time. A record for a person who has died, although less frequent, is particularly troubling because of the trauma it can cause for the next of kin and for the court clerk.

¶27 Although described as bad data, the more accurate description might be old data because the principal cause of the error is simply the passage of time. Discussions with representatives of the Driver License Division revealed that the source list from which the courts draw names has never been purged of records of people who have not renewed their license. An examination of court practices revealed the master jury list also had never been purged of old records. The record of persons identified as deceased were flagged so they could not be selected in the random draw, but records with known incorrect addresses have only recently been deleted from the master jury list.

¶28 Programmers have purged the master jury list and rebuilt it from the source lists using only those records of persons with activity within the prior four years. Programmers have modified the computer's merge instructions to draw only current records. These changes will keep address data more current and reliable.

II) IMPROVED SOURCE LISTS

¶29 The objective of multiple source lists is to make the master jury list as inclusive of the adult population as possible.[1] The lists used in Utah and commonly used in other states are the voter registration lists and the list of driver licenses and identification cards, but these are not the only possible source lists. Using the tribal roll of the Navajo Nation as a third source list for San Juan County has increased the representation of Navajos on the juries of that county.

¶30 The Administrative Office of the Courts, perhaps through the Tribal-State-Federal Court Forum, should initiate discussions with tribes around the state with the objective of duplicating in other counties the success experienced in San Juan County. The Committee recommends that the Administrative Office of the Courts investigate the feasibility of:

- using Social Security Administration records, Tax Commission records and/or public assistance records as source lists of jurors;
- using U.S. Postal Service records either as a source list of jurors or as a source of information with which to confirm addresses obtained from other lists;
- using information from the Bureau of Vital Records as a source of information with which to remove the names of deceased persons from the master jury list and to update names due to marriage, divorce or judicial decree; and
- purchasing software, to integrate with jury management software, with improved logic for identifying duplicate records of individuals.

B) JUROR QUALIFICATIONS

¶31 Except for a slight variation in wording, §78-46-7, governing the qualifications of jurors, complies with Standard 4, Eligibility for Jury Service, of the ABA Standards Relating to Jury Use and Management, and the Committee recommends no change to the statute. The Committee debated at some length the existing requirement that jurors be able to read, speak and understand English. The English language requirement might properly be revisited periodically to measure the developments in other jurisdictions, but currently there is no need for any change. The Committee has been unable to find any case holding the English language requirement unconstitutional,[2] and courts continue to find the English language requirement reasonable and important.[3] Whether a juror's proficiency in English is sufficient to qualify the juror for a case, considering the nature of the case and of the anticipated evidence, should be left to the sound discretion of the judge.

C) INVITING JURORS WITH DISABILITIES

¶32 Assistant Attorney General Steve Mikita reported to the Committee that one in six Utahns has a disability. The judiciary and the public would be the poorer if the jury selection process disenfranchised over 15% of our population. Building managers have designed new and remodeled courthouses to reduce physical barriers to jury service and to courthouse access generally: ramps; accessible parking; larger jury boxes; etc. These are much-needed improvements, and building managers should continue to identify and eliminate physical barriers.

¶33 Barriers other than physical obstructions make jury service difficult for persons with disabilities. Historically serving as a juror has required sight for observing photographs, charts, documents, and other physical evidence, hearing for observing recorded evidence, witnesses' testimony, lawyers' arguments and the judge's instruction, and speech for deliberating towards a verdict. Yet many people with limited or no ability in these areas daily evaluate information and make decisions in their personal and professional lives on matters of as much importance as are tried in the courtroom.

¶34 Utah law provides that a person may be excused from jury service, upon request of the juror or upon

the initiative of the court, for a "physical or mental disability rendering the person incapable of jury service…."[4] If a person is incapable of performing the functions of a juror, whether because of a disability or otherwise, then the person should be excused. However, the cost or inconvenience of accommodating a disability should not be a barrier to a person able and willing to serve. Utah law also provides that no person shall be "be excluded … from jury service on account of … disability…."[5]

¶35 Persons with disabilities need a special invitation to jury service. They must accommodate not only work schedules, dependent care and all of the other inconveniences common to nearly all jurors but also the inconvenience of managing their disability in an unfamiliar and perhaps hostile environment. The initial notice to jurors, typically the qualification form, should advise persons with disabilities that they may ask to be excused if they are incapable of jury service, but that the court will accommodate their disability if they are able to serve.

¶36 The courts should provide, in a discreet manner so as to avoid possible embarrassment,[6] all reasonable accommodations for jurors with disabilities as required by the Americans with Disabilities Act, such as TTY and sign language interpreters for those jurors who need such services. The request for accommodation might be integrated with the summons to ensure a simple and effective method of communicating the need for accommodation to the jury clerk. If a person with a disability employs a personal assistant, the assistant should be permitted to accompany and assist the juror during trial and deliberations but should not otherwise participate in the trial or deliberations. Although personal assistants understand from training and experience their role in the important affairs of the juror and can infer their role in the courtroom and jury room, the Supreme Court should approve an appropriate oath[7] for the assistant to ensure the full participation of the juror, not the assistant, in the trial and deliberations.

D) QUALIFICATION AND SUMMONS PROCESS

¶37 As part of jury management training, Committee staff discussed with jury clerks the differences between a one-step qualification process, in which qualification and summons to service are combined in one notice, and the two-step process currently used in Utah, in which prospective jurors are qualified at the beginning of their term of availability but not summoned until shortly before trial. The uniform preference of jury clerks is to remain with the two-step process. The extremely low return rate on qualification questionnaires creates uncertainty in the number of prospective jurors in the qualified pool. With a two-step process, that uncertainty is at least resolved well in advance of trial. Some people may ignore the qualification questionnaire, but those who take the time to complete and return the questionnaire almost certainly will appear when summoned. A one-step process would move the uncertainty in the number of available prospective jurors to the day of trial or, at best, to a few days before trial. The two-step process also works to the advantage of the jurors who may request to be excused temporarily. The practice in Utah has been to accommodate the schedules of jurors to the extent possible. A separate qualifying step permits the juror the opportunity to request scheduling consideration. A one-step process summons the juror with no such opportunity. The Committee recommends no change to the two-step process of separately qualifying and summoning jurors.

¶38 Research by the American Judicature Society has shown that people are offended by jury qualification questionnaires, notices, and summonses containing threats of sanctions for failure to respond.[8] The AJS research shows that people generally understand the right and the obligation of jury service, and, while put out by the inconvenience, nervous of an unfamiliar environment and perhaps skeptical of the process, they do not need the intimidation of threatening notices to motivate their participation. If a person fails to respond to the initial questionnaire or summons, subsequent communications may properly contain commands and sanctions, but the courts should presume in the first instance that the prospective juror will respond timely.

¶39 A letter from the Chief Justice accompanying the qualification form and explaining the basics of jury service and invite rather than command the prospective juror to participate. Commands to respond and notices of sanctions for failure to respond should be removed from the initial qualification questionnaire and from the initial summons. [9]

¶40 If a juror fails to complete the qualification questionnaire, CJA 4-404 requires the jury clerk to send a second notice advising the juror of the consequences of failing to respond. Whether the clerk takes the next step of issuing a summons to be served personally upon the juror by the Sheriff is left to local discretion. Given the press of business, few courts or Sheriffs' offices have the resources to pursue reluctant jurors. In addition to lack of resources, the court is faced with the Hobson's choice of letting its mailed summons be ignored or punishing a reluctant juror. The American Judicature Society reports that more rigorous enforcement of summonses is an effective tool in substantially increasing juror response.[10] Because Utah law requires the summons be personally served before proceeding with sanctions, Utah courts are not faced with the uncertainty of delivery discussed in the AJS study, but the negative attitude of at least that juror and the negative publicity cannot be avoided. Courts that have already arranged with the county Sheriff to serve summonses upon jurors should continue to do so. It is likely that practice has built a culture of responding to mailed summonses. Courts that do not issue summonses for personal service should carefully consider building such a practice at a measured pace. Ultimately, the objective should be not the punishment of reluctant jurors, but encouraging jurors to respond initially.

¶41 The judiciary should routinely measure juror yield – the ratio of jurors needed to jurors called – to gauge the level of compliance with notices as well as better estimate the optimum size of jury panels. To provide the necessary data from which to measure yield, trial court clerks (either jury clerks or in-court clerks) will have to record the final status of each juror in the jury selection process. These statuses should be kept to a minimum: no response (NR), not qualified (NQ), no appearance (NA), excused for hardship (EH), excused for cause (EC), excused by peremptory challenge (EP), selected (S), and not selected (NS). Some of these statuses are now being recorded by clerks, either in the computer or on paper, and the additional record keeping should not be burdensome. The records would be faxed to a technician at the Administrative Office of the Courts for data entry. This technician is the same as the one recommended, beginning on page 26, for recording the demographic information of jurors. The technician would merge the demographic categories with the jury yield categories to create a detailed profile of the jury selection process.

¶42 Courts should consider developing guidelines for temporarily excusing a juror from service to accommodate the juror's schedule. Routine work and school schedules may be difficult to accommodate because nearly all jurors will experience some difficulties, but courts should, within reason, accommodate extraordinary work or school schedules. Courts should accommodate vacation plans made prior to the court's summons, and, of course, courts should accommodate undue hardship, extreme inconvenience and public necessity. Written guidelines will help judges treat people in similar situations similarly, and, if the court delegates the responsibility for granting excused absences to the jury clerk, written guidelines are required by CJA 4-404.

E) VOIR DIRE

I) JUDGE-CONDUCTED AND LAWYER-CONDUCTED VOIR DIRE

¶43 Whether it is preferable for judges or lawyers to question prospective jurors is a debate with no clear resolution. As groups, both judges and lawyers have their strengths and their limitations, and individual skills vary. An effective judge questions jurors thoroughly, providing the parties sufficient information with which to form a challenge for cause or to exercise a peremptory challenge. Skilled counsel pursues information revealing bias without posturing or arguing the case. To the issue of who should question jurors during voir dire, the Utah rules of civil and criminal procedure offer as finely balanced a response as is possible. Civil Rule 47(a) provides: "The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination." Criminal Rule 18 is similar. Court rules express no preference for judge-questioning or lawyer-questioning, and the Committee recommends no change to this balance.

¶44 The Committee spent considerable time on the manner in which judges implement these rules. Judge-conducted voir dire first appeared to be a uniform practice in Utah. Upon closer inquiry, however, lawyer-conducted voir dire, while clearly the minority practice, appears to be a growing practice. Some judges permit

lawyers to conduct most of the questioning, and nearly all judges let lawyers ask some questions, particularly follow-up questions that might lead to a challenge for cause. Judges are finding that, far from relinquishing control to lawyers, lawyer-conducted voir dire may require judges to be more alert during questioning. Some members of the Committee perceive advantages to attorney-conducted voir dire, but all members believe further education and experience are necessary to alleviate fears. If lawyer-conducted voir dire is permitted, it must be supervised by the judge. In addition, the judge may set time limits and disclosure requirements, curtail references to evidence and otherwise govern the questioning.

¶45 Continuing education for judges and lawyers will encourage this diverse practice. To this end, the Committee has sponsored several education forums at judicial conferences, and Committee members have participated in developing and delivering training for lawyers at Bar conferences and CLE courses. Existing education programs for judges and lawyers should continue and should focus on the ultimate objective of voir dire: to elicit from prospective jurors meaningful information on which to evaluate challenges for cause and peremptory challenges.

¶46 Education about the methods of meeting this objective includes:

- the best use of pretrial procedures to develop proper questions – and questionnaires – and to anticipate problems in voir dire, such as the effect of pretrial publicity, tainting prospective jurors, and eliciting sensitive information;
- techniques for selection of jurors using attorney-conducted voir dire;
- techniques by which judges can supervise and control questioning by lawyers;
- protecting the privacy rights of jurors;
- identifying the concerns of judges – and appropriate responses – about lawyer-conducted voir dire, including arguing the case during questioning, ingratiating oneself with the jury, and timeliness;
- identifying the concerns of lawyers – and appropriate responses – about judge-conducted voir dire, including cursory inquiry and over-zealous "rehabilitation;"
- identifying the types of cases and issues better suited to judge-conducted voir dire; and
- identifying the types of cases and issues better suited to attorney-conducted voir dire.

¶47 The education effort should focus on developing the shared responsibility for selecting an impartial jury. Cursory examination by judges is a real concern to lawyers. Lawyers arguing their case in the guise of questioning is a real concern to judges. Rather than abandon the benefits of shared responsibility for seating an impartial jury, the Committee recommends learning the ways to improve the quality of questioning and to identify and control abuse.

¶48 Sound concepts governing voir dire are helpful, but nothing teaches like example, and the research necessary to find those examples will be time well spent. With the widespread use of video tape for recording trials, there is likely a large library of recorded voir dire sessions.

¶49 The Judicial Council should seek funds to review trial video tapes for particularly good and particularly bad examples of voir dire. These examples should be copied to a master tape that might be viewed by lawyers and judges or integrated by a presenter into a course of instruction on voir dire. The quality of the video tape may be such that voir dire sessions must be reenacted.

II) VOIR DIRE QUESTIONNAIRES

¶50 Utah has no statutes, rules or case law authorizing or regulating written questionnaires as part of jury voir dire. Yet some judges use questionnaires on either a regular or an occasional basis.

¶51 Questionnaires are useful in some circumstances. With the rule amendments recommended by the Committee (see the analysis on privacy in the following section), questionnaires will routinely protect the confidentiality of the juror better than oral questioning, so questionnaires may elicit sensitive or embarrassing information better than oral questioning. The written responses of one juror are not shared with another, so

jurors cannot mimic one another. Neither will the answers of one juror taint another. Questionnaires blend the efficiency of group voir dire with the detail of individual voir dire. Questionnaires do not replace oral voir dire, but serve as a tool to focus oral questioning. Written questionnaires do not permit a spontaneous exchange, nor do they permit the exchange of information through body language and other non-verbal communication.

¶52 Many of the principles for sound oral voir dire apply also to written questionnaires. Questionnaires should be as long as necessary, but as concise as possible. The parties should stipulate to as much of the content as possible. The judge should review and approve the questionnaire and rule upon any contested questions. These steps are similar to submitting questions to the judge for oral voir dire, and the court might use pretrial conferences to settle disputed questions.

¶53 To be most useful, questionnaires must be properly administered. The better practice is to administer questionnaires at the courthouse, proctored by the court clerk if not the judge and the parties. The solemnity of the courthouse adds formality and a sense of gravity that might otherwise be lacking. It may be more efficient for jurors to complete the questionnaire in advance of trial at their homes or offices, but this practice should be the exception rather than the rule. If a judge permits questionnaires to be completed without court supervision, the instructions should be clear that the juror must not discuss the case with anyone nor let any other person influence his or her answers.

¶54 Jurors should be advised that they are to complete the questionnaire under penalty of perjury. The court should schedule adequate time to complete the questionnaire. The parties must have the opportunity to review the answers prior to oral questioning. This last step is the only one having no counter-part in oral voir dire. Reviewing responses to the questionnaire takes time. The amount of time necessary depends on the length of the questionnaire, the size of the venire panel, and the number of parties. Each party needs a copy of the questionnaire to facilitate review, and the parties should share the cost to copy the questionnaires unless the court directs some other allocation of that expense.

¶55 Properly administered, the time necessary for administering and reviewing written questionnaires is not simply added to the time necessary for oral voir dire. Some questions asked and answered in writing may require oral follow-up, but questions are not merely repeated. Whether traditional voir dire supplemented by written questionnaires requires more, less or about the same time as oral questioning alone must await the judgment of experience.

¶56 Because of the demonstrated benefits of written questionnaires, judges should carefully consider using questionnaires in appropriate circumstances. The courts should develop a public repository of questionnaires organized by the type of case. Paper documents might be maintained at the state law library and digital documents might be maintained through the internet.

F) JUROR PRIVACY

¶57 Although jury service is described as a right and a privilege, jurors are, in essence, drafted to their task. Some approach their duties more willingly than others, but none volunteer. To determine whether these sometimes reluctant public servants are suited to the responsibility of resolving a public or private dispute, prospective jurors must endure voir dire, the process of answering personal questions about their lives. Often the information is routine, innocuous. Occasionally, jurors must provide to strangers and the public-at-large intimate details of sensitive or embarrassing information that they may have kept in confidence from family and friends. In either case, the information "would generally be regarded as being of such [a] personal and private nature as to [be] of no proper concern to others."[11]

¶58 In a trial though, the information becomes the proper concern of others. Parties with property and liberty at stake trust in the collective decision of community representatives. To secure that trust the court compels jurors to inform the parties of their acts, their circumstances, their opinions, their associations and those of their families and close friends. The information serves an important purpose for the parties whose interests are directly at stake; the parties use the information to obtain a fair and impartial jury. The broader availability of

the information to the media and, through it, to the public serves to secure confidence in the judicial system. "[I]nformation about jurors, obtained from the jurors themselves or otherwise, serves to educate the public regarding the judicial system and can be important to public debate about its strengths, flaws and means to improve it."[12]

¶59 The discussion that follows focuses on administering questionnaires in such a way as to protect the privacy of jurors and yet maintain public access to the questionnaires themselves. The principles can be applied to oral voir dire, but only by modifying the traditional manner of addressing jurors in an open courtroom.

¶60 Under the Federal and Utah Constitutions, the public has a qualified right of access to jury voir dire. Written questionnaires are merely an extension of oral voir dire, so questionnaires must be made available to the public upon request.[13] Whether the public has a qualified right of access to the names, addresses and other information from which a juror can be identified is an unanswered question in Utah. The two decisions on point from other jurisdictions have reached opposite results.

¶61 The Supreme Court of Delaware has held that the public does not have a qualified right of access to the names of jurors or to other information from which jurors might be identified.[14] The Court of Appeals of Michigan has held that the public does have a qualified right of access to such information after the verdict has been rendered and subject to the authority of the trial court to enter an order accommodating the jurors' legitimate and reasonable concerns for safety.[15] Statutes and rules of some states and some federal district courts prohibit all access to jurors' names and addresses; others permit the judge discretion to close the records.[16] Currently, Utah has no statute or rule regulating access to the names, addresses and other identifying information of jurors.

¶62 In traditional voir dire, the judge and parties commonly question a juror in-chambers or otherwise outside the public view when the information sought is so sensitive or embarrassing that only in a private setting is the juror likely to respond fully and candidly. The law recognizes this practice as a proper departure from the principle of public access to voir dire because of the need of the parties to full disclosure to ensure an impartial jury and because of the juror's right to privacy.[17] The record of the private session is a controlled record.[18] The Committee has not been able to discern in the case law any bright line between permissible in-chambers interviews of select jurors on select questions and the impermissible exclusion of the pubic from voir dire. It must remain sufficient for this report to observe that, at some point, in-chambers interviews become so pervasive as to effectively violate the public's right of access.

¶63 To use questionnaires to their fullest potential, the courts must provide the written equivalent of in-chambers voir dire. It is theoretically possible to redact from a questionnaire those answers that would have qualified for in-chambers voir dire. But, if questions are asked in logical progression, redaction would be logistically difficult and merely call attention to the fact that particular questions were missing from the questionnaires of some jurors. Questions qualifying for redaction could be placed at the end of the questionnaire and removed from every juror's form, but the questions may not progress in an appropriate manner. Instead, the committee recommends a simpler model to protect the privacy of jurors and to provide the entire questionnaire to the public by severing the link between the names of jurors and the content of the questionnaire and by denying public access to jurors' names until after the jurors are discharged.

¶64 Under this model, the questionnaire would contain no information from which a juror could be identified other than the juror's court-assigned number. The public has a qualified right of access to the questionnaire so the questionnaire would be classified as a public record. All information identifying the juror, including the juror's court-assigned number, would be recorded on a separate cover page. The public has no qualified right of access to information identifying the juror, at least prior to the verdict, so the cover page would be classified as private until after the jurors are discharged. The identifying information would be provided to the court and to the parties but not to the public. The parties' copies of the information would be collected when jury selection is complete and parties would be under a continuing order not to release the identifying

information to the public. Although the questionnaire itself is a public record, the juror's privacy is maintained by severing the link between the juror's name and the questionnaire. If, in the context of a particular case, the judge does not believe this method of administering the questionnaire sufficiently protects a juror's privacy, the judge should direct sensitive questions to be asked orally in chambers.

¶65 The Committee has developed a proposed cover page which, in addition to containing the information identifying jurors, would advise jurors that this method of protecting their confidentiality is routine; would inform jurors on the competing objectives of public access and juror privacy, and would instruct jurors on completing the questionnaire.

¶66 Prior to the verdict, the judiciary and the parties have an overriding interest in keeping from public scrutiny records from which a juror can be identified. Maintaining the confidentiality of such records protects the integrity of the jury selection and trial processes, which should not be influenced by extra-judicial investigations and evidence. After the verdict, the policy of private juror records is governed by the personal concerns of the jurors, such as safety and privacy, and the generally recognized principle of public access to the institutions of government. Media representatives have addressed the Committee arguing that the public is well-served when the press can interview jurors to obtain a personal perspective on the case just tried. Further, they argue, many jurors want the opportunity to speak with the press. On the other hand, many citizens take extraordinary steps to keep identifying information out of the public realm, and the judiciary should respect those efforts to the extent allowed by law and sound public policy.

¶67 Using the rationale of the Delaware Supreme Court, the Judicial Council could use its authority to classify records to deny all public access to records identifying jurors. The Committee does not believe such an extreme measure is necessary. A reasonable accommodation of the competing interests of juror privacy and public access can be reached by classifying records from which a juror can be identified as private until the jurors are discharged. Thereafter, the jurors' names should be part of the public record, unless a juror requests his or her name be kept private and the court determines that the interests favoring privacy outweigh the interests favoring public access. The qualification form should notify jurors of their privacy rights and provide a simple and effective method of requesting that a name be classified as a private record. Other information from which a juror could be identified, such as address or phone number, should remain private even after the verdict to respect the efforts of those jurors who have taken the steps necessary to keep that information unavailable from other sources.[19] Even after jurors' names become public, the privacy of answers to a voir dire questionnaire is maintained because there is no link between a juror's name released after trial and the questionnaire the juror completed anonymously prior to trial, although that link could probably be built with sufficient research.

¶68 No system can completely ensure the anonymity of jurors. To maximize the jurors' privacy during public oral voir dire, the judge, counsel and parties need to address and refer to jurors either by first name or by court-assigned juror number. These are not good alternatives – the one is too informal, the other too impersonal – but they are needed to improve the confidentiality of the jurors. Whether such an extreme measure is needed should be left to the sound discretion of the judge. The task of linking a juror named in public voir dire to an anonymous juror completing a questionnaire is time-consuming and costly. In a typical jury trial, no one likely will see any benefit to the task. In many jury trials, there is little or no sensitive information about a juror to protect. In most cases, the judge might properly dispense with the formal precautions and permit jurors to be addressed and referred to by surname. The decision is one of convenience, however. Once court participants refer to jurors by name, those in attendance at the hearing may report what transpired, including the names of jurors, and anyone may obtain the tape or transcript record of the hearing.

¶69 Judges and lawyers should recognize that the very process of voir dire, while necessary to secure a fair trial intrudes upon the privacy of jurors. The law requires jurors to divulge personal and private information about themselves not just to the judge and the parties but to other jurors and to the public. To reduce the strain of questioning and disclosure, the judge should:

➢ explain to jurors the method and purposes of voir dire and of removing a juror from the panel;

- ➢ explain the ability to request a private, in-chambers interview on sensitive questions;
- ➢ maintain control of attorney-conducted voir dire to ensure lawyers do not pursue topics of no relevance; and
- ➢ ensure that lawyers – at all times, but especially when asking questions – treat jurors with respect.

G) DEMOGRAPHIC INFORMATION ABOUT JURORS

¶70 It is important that a discussion of demographic information about jurors immediately follow the recommendations to protect juror privacy because it is critical that jurors' responses to demographic questions be completely confidential.

¶71 Rule 4-404(5)(C) of the Judicial Council requires that the juror qualification form "contain inquiries regarding demographic information sufficient to [evaluate the inclusiveness of the jury source lists]." The Committee believes it critically important to gather such information, yet the courts have never done so. Other than anecdotal information, there is little data on which to analyze the question of whether procedures or players operate to exclude classes of persons from jury service. The judicial performance evaluation program includes a survey of jurors regarding the performance of the trial judge, and this survey includes the race and ethnicity of the members of the jury panel. However, a study of the effect of jury selection rules and practices on the exclusion of classes of people should include an evaluation of the qualified jury pool, the venire panel and the trial jury. The Committee does not know what the demographic information will show, although the experience of Committee members is that persons of color are seldom included in the venire or jury panels. The report of the judicial performance evaluation program from November, 1999 shows the following racial and ethnic profile for trial juries for the preceding two years:

	Districts 1,5,6,7,8	District 2	District 3	District 4	State Total
African American	1%	1%	1%	1%	1%
Asian	0%	2%	2%	0%	1.5%
Caucasian	88%	91%	91%	94%	91%
Hispanic	3%	2%	3%	1%	2.5%
Native American	7%	3%	3%	3%	4%
Pacific Islander	0%	1%	0%	1%	0%

¶72 Jury trials are one of the great democratic traditions of our country, and the courts must ensure that juries are representative of the community. Demographic information will help the judiciary determine the success of its efforts. The Committee recommends the Judicial Council obtain demographic information about the qualified jury pool, the venire panel and the trial jury in the following demographic categories: race, ethnicity, religion, gender, age, disability; education; and income. The categories are based on §78-46-3, the non-discrimination statute for jurors. The Committee believes collecting the data is an important empirical method of determining whether jury selection procedures or decisions exclude classes of persons from jury service.

¶73 The sensitive manner in which the information is requested is critical. The request for the information, perhaps by the Chief Justice, should explain that the information is based on state law, is voluntary and is completely confidential. The request should further explain that the information will not be used to disqualify anyone but only to ensure that the privilege of jury service is not denied anyone.

¶74 To minimize the impact on trial court clerks represented by this new effort, the Committee recommends a particular method of implementation. This methodology will combine recording demographic information and information about juror yield. The demographic information form should be mailed to jurors as part of the initial qualification process. When completed by the juror, the demographic information should be mailed to or forwarded to a data entry technician, which would be a new position in the Information Services department of the Administrative Office of the Courts. The technician would record in the computer the

demographic information for each juror in a manner that protects the privacy of the juror. The AOC should program the computer to report by county the demographic profile of each of the three stages. The aggregate demographic data should be available upon request. The responses of individual jurors should be completely confidential. Because it would be inappropriate to ask demographic questions as part of voir dire, the responses of jurors to demographic questions should not be provided to parties or their counsel.

¶75 This recommendation represents additional work for court clerks. Including the demographic questionnaire in the mailing with other qualification materials should not be unduly burdensome, but recording the responses of tens of thousands of jurors and tracking their progress through the selection process is a significant record keeping task.

¶76 The judiciary needs information from which to determine the representativeness of juries, but that information should not be used to erode peremptory challenges. Some lawyers may use peremptory challenges improperly to remove classes of people from the venire panel, and in response the United States Supreme Court has developed a process by which jurors' rights are protected.[20] Properly used, peremptory challenges can improve the process of removing a biased juror without the time-consuming and embarrassing-to-the-juror process of establishing grounds for cause. Peremptory challenges can remove a juror whose impartiality is suspect but whose answers to questions do not give rise to a challenge for cause. The peremptory challenge is an important procedural right of the parties, and the jury selection system protects against its misuse. Information intended to promote minorities in the jury system should not be used to challenge this important right.

H) METHOD OF SELECTING JURORS

¶77 The methods used to select jurors have evolved away from the method permitted by URCP 47(g) and URCrP 18(a). The Committee investigated three methods of selecting jurors: the strike and replace method, which is currently permitted under Utah court rules; the struck method, which is recommended as an authorized alternative; and White's method, which the Committee rejected as unduly cumbersome.[21]

¶78 The Supreme Court should amend the civil and criminal rules of procedure to permit the judge wide latitude in the method of selecting the jury, including the strike and replace method or the struck method. With more than one method of jury selection from which to choose, it is essential the judge advise the parties prior to trial of the method to be used at trial.

¶79 The struck method reaches deeper into the venire panel than the strike and replace method, so the method of jury selection will change the focus of the lawyers during questioning and change the use of peremptory challenges. To be fair to the parties, it is essential they know in advance which method will be used.

¶80 Historically, after the completion of voir dire and challenges, the jurors to try the case were selected from among those remaining in the order in which they appeared on the jury list. This requirement has been removed from the draft rule. Selecting the jurors in the order in which they appear on the jury list permits parties to focus their peremptory challenges on those jurors at the top of the list. Randomly selecting jurors from among those remaining requires parties to use their peremptory challenges over a broader pool. Either method should be permitted, but, again, the parties must know in advance how this final roll call will be conducted so they may better exercise peremptory challenges.

¶81 The principal difference between the strike and replace method and the struck method is the order of individual voir dire. In the strike and replace method, questioning focuses on only enough prospective jurors to seat a jury, including alternates, assuming all parties exercise all peremptory challenges. The judge and the parties question the prospective jurors either as a group or individually. A juror removed for cause is replaced and voir dire of the replacement juror proceeds. After challenges for cause are complete, the parties exercise their peremptory challenges, and the remaining jurors try the case. In the struck method, questioning is directed towards the entire venire panel. Jurors removed for cause are not replaced. After challenges for cause are complete, the parties exercise their peremptory challenges, and the court selects from among the remaining

jurors enough to try the case.

¶82 Both methods of selection have their strengths and weaknesses; the Committee does not recommend one over the other. The traditional strike and replace method is complete when a sufficient number of jurors have been passed for cause to permit all parties to exercise their peremptory challenges and still leave enough to try the case. The struck method continues until all members of the venire panel have been questioned and either challenged or passed for cause. The strike and replace method usually involves fewer jurors than the struck method and therefore requires less time. Because the strike and replace method focuses upon those jurors randomly placed at the top of the list – those jurors who have a greater probability of being selected to try the case – it is common in the strike and replace method for jurors well down the list never to be asked a question except as part of group voir dire. The struck method directs voir dire questions to all members of the venire panel, both as a group and as individuals. The struck method involves all of those summoned that day on an equal basis.

¶83 The Committee recommends further changes to the selection methods of the rules of procedure.

- ➢ The two methods permitted by the amended rules are not exclusive. A judge may use variations on these themes or develop a different method, provided the method meets the objectives of fairness and random selection and provided the judge informs the parties of the method to be used.
- ➢ The judge may rule on challenges for cause during questioning or at the end of questioning.
- ➢ The judge must rule on a challenge for cause outside the presence of other jurors if requested by a party.

I) SELECTING ALTERNATE JURORS

¶84 The Committee recommends that alternate jurors be selected in the same manner as principal jurors. The primary effect of the proposed changes is to eliminate the requirement in the civil rules – a requirement not found in the criminal rules – that regular peremptory challenges be used only against principal jurors and additional peremptory challenges be used only against alternate jurors. The Committee recommends selecting the alternate jurors under the same process as the principal jurors, without limiting the additional peremptory challenge to the alternate jurors.

¶85 After much debate, the Committee recommends the criminal rules be amended to reflect the current ratio of additional peremptory challenges for alternate jurors – one additional peremptory for either one or two alternates – found in the civil rules. Currently the criminal rules provide one additional peremptory challenge for each alternate.

¶86 URCP 47(b) states: “An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict.” The Committee recommends this sentence be amended to permit the court and parties to agree not to discharge the alternate jurors. There is a similar provision and proposed amendment in the criminal rules. The reasons for the amendment are two-fold: First, in a trial with significant media attention in which principal jurors are not sequestered during deliberations, the court may need to excuse alternate jurors from attending while keeping them under their oath. Second, although the Committee does not endorse alternate jurors being substituted for principal jurors once deliberations have begun, the parties, especially in civil cases, may be willing to stipulate to such a substitution to avoid choosing between a verdict by less than a full jury and the cost of a retrial.

J) CHALLENGES FOR CAUSE

¶87 A proposal to eliminate peremptory challenges precipitated the Committee’s work with challenges for cause. While peremptory challenges give rise to legitimate claims of arbitrariness and manipulation, they also serve the effort to seat a fair and impartial jury. The *Batson* line of cases protects, to a degree, a juror’s right not to be the object of prejudice by a party or lawyer, but those cases demonstrate the existence of such prejudice and the need for such protection. Alternatively, as noted earlier in this report, peremptory challenges improve the process of removing a biased juror by avoiding the time and embarrassment accompanying a

challenge for cause. After much debate, the Committee remained divided on the question of peremptory challenges with a small minority supporting a change from the current system.

¶88 The only tools of the judge for seating an impartial jury are effective voir dire and challenges for cause. When these two steps are complete, the role of the judge in seating the jury is minimal. Judges legitimately look to counsel for assistance in voir dire, but judges too frequently defer to lawyers' peremptory challenges the judicial responsibility to seat a fair jury. Relying upon peremptory challenges for a fair and impartial jury is poor policy; first and foremost judges should soundly determine challenges for cause.

¶89 The Utah Supreme Court has noted a tendency of trial court judges to rule against a challenge for cause in the face of legitimate questions about a juror's biases. The Supreme Court limited the following admonition to capital cases, but it serves as a sound caution even in trials of lesser consequence.

> [W]e take this opportunity to address an issue of growing concern to this court. We are perplexed by the trial courts' frequent insistence on passing jurors for cause in death penalty cases when legitimate concerns about their suitability have been raised during voir dire. While the abuse-of-discretion standard of review affords trial courts wide latitude in making their for-cause determinations, we are troubled by their tendency to "push the edge of the envelope," especially when capital voir dire panels are so large and the death penalty is at issue. Moreover, capital cases are extremely costly, in terms of both time and money. Passing questionable jurors increases the drain on the state's resources and jeopardizes an otherwise valid conviction and/or sentence. ... If a party raises legitimate questions as to a potential juror's beliefs, biases, or physical ability to serve, the potential juror should be struck for cause, even where it would not be legally erroneous to refuse.[22]

¶90 In determining challenges for cause, the task of the judge is to find the proper balance. It is not the judge's duty to seat a jury from a too-small venire panel or to seat a jury as quickly as possible.[23] Although thorough questioning of a juror to determine the existence, nature and extent of a bias is appropriate, it is not the judge's duty to extract the "right" answer from or to "rehabilitate" a juror.[24] The judge should accept honest answers to understood questions and, based on that evidence, make the sometimes difficult decision to seat only those jurors the judge is convinced will act fairly and impartially. This higher duty demands a sufficient venire panel and sufficient voir dire. The trial court judge enjoys considerable discretion in limiting voir dire when there is no apparent link between a question and potential bias, but "when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears. The trial court must allow such inquiries."[25] The court should ensure the parties have a meaningful opportunity to explore grounds for challenges for cause and to ask follow-up questions, either through direct questioning or questioning by the court.[26]

¶91 The objective of a challenge for cause is to remove from the venire panel persons who cannot act impartially in deliberating upon a verdict. The lack of impartiality may be due to some bias for or against one of the parties; it may be due to an opinion about the subject matter of the action or about the action itself. The Rules of Civil Procedure have a few – and the criminal rules many more – specific circumstances, usually a relationship with a party or a circumstance of the juror, from which the bias of the juror is inferred. In addition to these enumerated grounds for a challenge for cause, both the civil rules and the criminal rules close with the following grounds: formulation by the juror of a state of mind that will prevent the juror from acting impartially. However, the rules go on to provide that no person shall be disqualified as a juror by reason of having formed an opinion upon the matter if it satisfactorily appears to the court that the person will, notwithstanding that opinion, act impartially.

¶92 The Committee recommends amendments to the grounds for challenges for cause that focus on the "state of mind" clause. In determining whether a person can act impartially, the court should focus not only on that person's state of mind but should consider the totality of the circumstances. These circumstances might include the experiences, conduct, statements, opinions, or associations of the juror. Rather than determining that

the juror is "prevented" from acting impartially, the court should determine whether the juror "is not likely to act impartially." These amendments conform to the directive of the Supreme Court: If the judge is not convinced of the ability of a person to act impartially, the court should remove that person from the panel.

¶93 There is no need to modify this determination with the statement that a juror who can set aside an opinion based on public journals, rumors or common notoriety and act impartially should not be struck. Having read or heard of the matter and even having an opinion about the matter do not meet the standard of the rule. Well-informed and involved citizens are not automatically to be disqualified from jury service. Sound public policy supports knowledgeable, involved citizens as jurors. The challenge for the court is to evaluate the impact of this extra-judicial information on the ability of the person to act impartially. Information and opinions about the case remain relevant to but not determinative of the question: "Will the person be a fair and impartial juror?"

¶94 This new standard for challenges for cause represents a balance more easily stated than achieved. These amendments encourage judges to exercise greater care in evaluating challenges for cause and to resolve legitimate doubts in favor of removal. This may mean some jurors now removed by peremptory challenge will be removed instead for cause. It may also mean the court will have to summon more prospective jurors for voir dire. Whether lawyers will use fewer peremptory challenges will have to await the judgment of experience.

¶95 As part of this effort, the Committee recommends that CJA 4-404(7) be amended to eliminate the presumed number of jurors to be summoned.[27] The balance of the rule correctly states the principle that the court should summon the fewest number of jurors reasonably necessary to complete jury selection. The rule also correctly identifies the different variables contributing to that calculation, but the judge and clerk should make the calculation based on experience and the needs of the case at hand. The rule has not been well-received. Many judges and clerks ignore the general admonitions and focus on the numerical presumption, which they perceive as artificial. At a minimum, the Committee anticipates that, at least initially, the new standard for challenges for cause will require more jurors to be summoned for voir dire.

K) ONE DAY – ONE TRIAL

¶96 One day – one trial describes the principle that a prospective juror summoned for service on any given day will report for voir dire for that day or for the duration of the trial for which he or she is selected. It is estimated that about 40% of U.S. citizens, in both urban and rural communities, live in a jurisdiction using one day – one trial.[28] The current law in Utah is that jurors must report up to five times or for one trial. However, reports from most jury clerks indicate they seldom summon a juror later in a term if that juror completed voir dire and was not selected for an earlier trial. If these reports are accurate, most Utah courts have a one day – one trial system in practice, if not by law.

¶97 One day – one trial is a means of spreading the opportunity and the obligation of jury service as broadly as possible and so limiting the burden on any one person. "One Michigan county experiment with 'one day/one trial' juries showed that they include more executives, professionals and others of an increased educational level. 'Combined with the elimination of professional exemptions, one day/one trial could greatly increase courts' chances of obtaining more inclusive jury pools.'"[29] One day – one trial fits very well with the judiciary's efforts to improve public confidence in the courts. To be able to tell jurors definitively they need serve only for one day or for one trial, rather than warning them they may have to come back in a week or a month (or two) provides the jurors with a much greater sense of predictability and control. One day – one trial also will relieve clerks of a small record keeping burden: tracking those jurors who are called more than once but not yet five times. The financial cost or savings of one day – one trial should be modest. The cost of qualifying additional jurors will be offset by the decrease in the frequency of the "second day" juror fee of $49.

¶98 The Judicial Council should pursue legislation to make one day – one trial the law in Utah. As part of this Committee's study, court clerks are counting the number of times they must recall a juror who was not selected for an earlier trial, but the results of the research will not be available until after the issuance of this report. If the research shows that one day – one trial would be burdensome in some counties, the legislation

should permit the Judicial Council to authorize exceptions.

4) THE TRIAL

A) JUROR NOTES

¶99 Current rules of the Supreme Court grant to jurors the right to have with them during deliberations any notes they may personally have taken. URCP 47(m) provides: "Upon retiring for deliberation the jury may take with them ... notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person." URCrP 17(k) is similar. The Utah rules, however, do not expressly give jurors the right to take notes. The nearly uniform practice is to permit jurors to take notes, and many judges advise jurors they may do so. Some judges provide jurors with writing materials for that purpose.

¶100 The Utah rules of procedure should recognize an absolute right of jurors to take notes of any part of the proceeding as well as to take those notes to deliberation. Judges or clerks should instruct jurors of that right and provide jurors with writing materials.

¶101 Most prudent people in the course of their important affairs take and rely upon notes. Few rely exclusively on unaided recall. The objections to note taking raised by some are without merit.[30] Juror's notes do not produce a distorted view of the case. Jurors can take notes and keep pace with the trial. Those who take notes do not disturb those who do not, nor do notetakers have an undue influence over non-notetakers. To the extent these objections are problems in jury trials, they exist not because of notes but because of the jury trial process itself. Evidence produced at trial will influence different jurors in different ways. Jurors who emphasize one piece of evidence will have a view of the trial different from - perhaps distorted from - the juror who emphasizes a different piece of evidence. Collective decision making, regardless of the setting, is always dominated by some. A task of the jury foreperson is to facilitate the deliberation to encourage all to participate. Notes neither cause nor exacerbate these problems. Notes serve merely to aid recall and thus produce more thorough deliberations.

B) JUROR QUESTIONS

¶102 The Utah Supreme Court first recognized the discretion of the trial court judge to invite jurors to ask questions in 1945,[31] and recognized limits on that discretion in 1958.[32] Whether permitting jurors to ask questions is sound policy is a matter of considerable debate. The Committee found only one statistical study of questions by jurors and the results indicate that neither the perceived advantages nor the perceived disadvantages were as strong as anticipated.[33]

¶103 Utah case law permits judges to invite jurors to ask questions of witnesses. The Committee has developed a suggested process for administering questions by jurors, and recommends against reducing this process to a rule of procedure or evidence. These procedural steps are offered only as a guide to judges who permit questions by jurors. Whether to permit such questions should be left to the discretion of the judge.

¶104 If the judge permits questioning by jurors, the Committee recommends the following process.

- The judge should advise parties and counsel prior to trial whether the jurors will be invited to ask questions. The judge should instruct the jurors as part of the initial instructions or prior to the first witness.
- After all examination and cross-examination of a witness by counsel and unrepresented parties is complete, the judge may ask the jurors whether they have any questions and, if so, to write the question and hand it to the bailiff or clerk. To avoid undue repetition and interruption, the judge may instruct the jury only at the beginning of trial or at the beginning of each day of trial.
- The judge should review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may refuse a question not proper under the Utah Rules of Evidence

even though no objection is made.

- ➢ If the question is not allowed, the judge should inform the jury without elaboration that the question is not permitted.
- ➢ If the question is allowed, the judge should ask the question or permit counsel or an unrepresented party to ask it. The question may be restated in proper form.
- ➢ Counsel and unrepresented parties should be allowed to examine the witness after the juror's question.
- ➢ The court should preserve the question, such as by marking it as a court exhibit or entering it in the court file.

C) PRELIMINARY STATEMENT OF THE CASE

¶105 Also called a "mini-opening statement," a preliminary statement of the case does not serve the same purpose as the more traditional opening statement, nor does it replace the opening statement. A preliminary statement of the case, made prior to voir dire, provides the jurors a context in which to better understand and to more knowledgeably answer questions. A preliminary statement of the case may be most useful in longer, more complex trials.

¶106 Whether to make or to request counsel to make a preliminary statement of the case prior to voir dire should be within the discretion of the judge. If a preliminary statement of the case is made, it is more properly delivered by the judge, who might request counsel jointly to prepare and approve a statement. If a judge permits counsel to make a preliminary statement, the judge should notify counsel in advance and be particularly attuned to prevent argument or posturing at this early stage of the trial.

D) PERIODIC SUMMARY OF THE EVIDENCE

¶107 Permitting counsel to summarize the evidence at the close of discrete segments of the trial is not a regular practice in Utah, and, without the benefit of more experience, the Committee recommends against any rule changes. Reports have shown that a periodic summary of the evidence may help jurors to better comprehend and recall the evidence and avoid making premature judgments, especially in long trials, trials over non-contiguous days, complex trials and trials in which a witness appears out of proper order.[34] However, the Committee believes such a practice would disrupt most trials to no advantage.

¶108 Whether to permit a periodic summary of the evidence should be left to the sound discretion of the judge. The judiciary and the Bar should jointly develop this topic through education, designing best practices to ensure fairness.

E) PRESENTING THE EVIDENCE

¶109 Oral testimony under oath is a bedrock principle of our system of justice. Yet technology, both simple and advanced, can support oral testimony to the advantage of the jury. Lawyers regularly use demonstrative evidence such as enlarged diagrams, charts and photographs prepared in advance and entered into evidence to supplement and summarize oral testimony. A video presentation may be appropriate in some cases. Standard presentation software may be of great assistance. Lawyers may prepare notebooks for jurors in which are organized materials relevant to the case.[35] Lawyers can help reduce the tedium and boredom of foundation evidence by stipulating to admission. The Committee challenges lawyers in consultation with the judge and with the stipulation of the parties to use procedures and technology to focus the jurors' attention and increase the jurors' comprehension.

F) PLAIN LANGUAGE JURY INSTRUCTIONS

¶110 The literature is replete with articles published in the last two decades lamenting the unnecessary complexity of legal writing in general and of jury instructions in particular. The ability to understand jury instructions goes to the heart of public confidence in the jury system: The jury is free to determine facts based

on the evidence, but the jury is bound to accept the law as instructed by the judge. If the jurors do not understand the law – the jury instructions, what law then do they apply?

¶111 The trial court judges and lawyers who struggle with jury instructions are understandably concerned that instructions withstand challenge on appeal. The self interest of those involved at trial is to write the jury instruction to mirror as closely as possible the applicable statute, rule or case law rather than summarize or restate the law for fear of misstating or omitting a critical detail. Even pattern jury instructions, because they are advisory only, tend to rely heavily on the verbatim wording of statutes, rules and cases. Appellate court judges review an instruction as given at trial with only the discretion to approve it as sufficient under the circumstances or strike it. Appellate courts do not often have the opportunity to suggest an improved version of an instruction. And so approved instructions are used in future trials, often verbatim, creating a cycle without any real opportunity for improvement.

¶112 The Litigation Section of the Utah State Bar has taken a leading role in breaking this cycle. In 1993, a committee of the Litigation Section completed work on the Model Utah Jury Instructions (MUJI) for civil cases.[36] In the words of the drafting committee's preface to the instructions: "[I]t has been the intent of the committee to provide instructions that are couched in simple, clear and brief language that will be understandable to the jury. …. In our attempt to use 'plain language,' we tried, where possible, to avoid the use of statutory and appellate court language because it tends to be confusing when quoted in the context of a jury instruction." The drafting committee is now a standing committee of the Litigation Section and will soon release for public comment plain language model instructions for criminal cases and then begin the process of reviewing and updating its earlier work on civil instructions. Again in the words of the 1993 preface: "Without continued effort to maintain current instructions, the thousands of hours of volunteer time spent in preparing these instructions will have been wasted."

¶113 This Committee commends the Litigation Section and the many volunteers for their work in developing and revising model instructions using plain language drafting principles to produce simple, clear, accurate and precise statements of the law. The law is often complex, but an accurate and precise statement of the law can, with effort, be made clear to non-lawyers.

> Anyone who has ever bought a product unassembled and tried to put it together realizes that the clarity of the instructions can make a world of difference. Poorly written instructions that use a large number of undefined technical terms with no illustrations are almost impossible to follow; the frustrated purchaser will either give up or call in an expert. On the other hand, even a very complicated job can often be performed by an amateur if the instructions are sufficiently "user-friendly."…. [I]f the [jury] instructions are more user-friendly, perhaps including illustrations and laying out the logical steps that the jury must follow to reach a verdict, the jury will be far less frustrated – and will be considerably more likely to actually apply the law to the facts.[37]

¶114 The Supreme Court should take a greater role in developing plain language jury instructions, but too great a role may restrict the evolution of the common law. The Litigation Section anticipates releasing its Model Criminal Jury Instructions later this year, and that effort should continue to fruition. For the future, the Supreme Court should appoint two advisory committees, for civil and criminal jury instructions, consisting not only of trial judges and lawyers but also law school faculty and communication experts. These advisory committees should build on the sound foundation of the Litigation Section by further simplifying existing model instructions and drafting new instructions in response to changes in the law. The drafting process should include a comment period similar to the Supreme Court rule making process. The Supreme Court should supervise the advisory committees but, to avoid interpreting statutory law and to avoid restricting the evolution of the common law, should not approve the instructions. The status of the advisory committees and their work with the bar and the bench should be sufficient to ensure the use of the instructions in the trial courts.

G) PRELIMINARY AND INTERIM INSTRUCTIONS

¶115 The court can help put the case in context with appropriate and timely instructions. In the traditional trial, the jury is not told what it is to do with the information it receives, is not told of the relative weight of the evidence, is not told of its responsibilities or the responsibilities of the parties until the end of the trial. Many of these instructions can and should be given prior to opening statements to ensure the jury has a better sense of its role and a fuller context for the case. These can be bolstered by interim instructions. The current rules of civil and criminal procedure authorize any party to request instructions "at the close of the evidence or at such earlier time as the court reasonably directs."[38] This is sufficient authority for the parties or the court to propose preliminary and interim instructions, but the rules do not go far enough to encourage judges and parties to make more frequent use of the advantages offered by preliminary and periodic instructions.

¶116 Judges and parties should use pretrial conferences to develop preliminary instructions specific to the case. Some judges already use pretrial conferences to consider at least some final instructions, so the issue is only which instructions to give at the start of trial and which to give at the end. Not all instructions proper at the close of evidence are proper prior to opening statements. Preliminary instructions anticipate future evidence rather than reflect upon past evidence. The trial may not develop exactly as anticipated, and, rather than leave the jury with superfluous instructions, judges should refrain from approving and giving instructions on a topic if there is a genuine dispute about whether the jury will have to decide the issue. Nevertheless, many general and case specific instructions can be given safely and with greater effect prior to opening statements and then reinforced at the end of trial.

¶117 Interim written instructions also may be useful in appropriate cases but present more difficulties. In many circumstances, the court may think an interim instruction would assist the jury, yet the dynamics and logistics of the trial present obstacles. An important feature of all instructions – traditional, preliminary and interim – is notice to the parties of the court's intent to give an instruction and the opportunity in advance for the parties to consider and perhaps object to its content. Preliminary instructions can be discussed at the pretrial conference, but, without a recess or bench conference, there is little opportunity for the parties to consider a proposed interim instruction. Interim written instructions should be authorized, with sufficient safeguards for the parties, to be used in the discretion of the judge.

5) DELIBERATIONS

A) PRELIMINARY DELIBERATIONS

¶118 The Committee recommends against permitting preliminary deliberations. Arizona has implemented a practice in civil cases of allowing the judge to instruct the jury that they may discuss the case among themselves when all jurors are present provided they come to no conclusions. Although it seems counter-intuitive that six or eight or twelve people with little in common but the case before them would not talk about that case, anecdotal evidence by Committee members indicates that generally jurors do follow the current instruction not to discuss the case with others or among themselves. Whether the case is civil or criminal, permitting the jurors to discuss the evidence during breaks in the trial can place a party at a great disadvantage. Juries can be dominated by one or two strong personalities. Sanctioning the practice of preliminary deliberations permits an even greater opportunity for some jurors to wield too much influence.

B) AJS GUIDE TO DELIBERATIONS

¶119 The National Center for State Courts reports that participating in deliberations is one of the most stressful parts of the trial for jurors and that providing jurors with guidelines for engaging in deliberations significantly reduces stress,[39] The American Judicature Society has published a simple manual to assist jurors in their deliberations, and the AJS research and report accompanying the Guide show the Guide to be of significant help to jurors.[40] The Guide is very short. It contains suggestions to jurors for getting organized and getting started, selecting a jury foreperson, discussing the evidence and the law, getting assistance from the court, voting, announcing the verdict, and concluding jury service. The Administrative Office of the Courts should provide the AJS Guide Deliberations to all judges who want to use it. Whether to provide the Guide to

jurors should be left to the discretion of the judge.

6) CONSIDERING THE JURORS

A) TRIAL SCHEDULES

¶120 The manner in which a judge manages his or her caseload and, within that larger responsibility, manages his or her trial calendar are exclusively within the discretion of the judge, so the suggestions that follow are not a model for a preferred, uniform trial schedule, but only suggestions the judge might consider in exercising that discretion.

¶121 Trial dates and times necessarily reflect the scheduling limitations of the judge and those of the lawyers. Lawyers in turn work to accommodate the schedule of witnesses, but seldom are jurors consulted. In setting the trial schedule – starting time, ending time, number and duration of recesses – the judge should consider inquiring of the needs of the jurors. The jurors' needs probably will not be uniform, and many cannot be accommodated, but jurors, like everyone else who must manage a schedule, will understand the need to balance competing interests and appreciate being consulted. When the trial schedule is set, the judge should advise the jurors of that schedule and hold to it as much as possible. The comments of formers jurors on this point were uniform: regardless of the trial schedule, do not deviate from it. Sometimes a judge is faced with a situation warranting a significant deviation from the previously set schedule, but the judge should not change the schedule without inquiring of the jurors about the impact upon them and taking steps to accommodate the resulting needs.

¶122 On limited experience, Committee members spoke favorably of a compressed trial schedule as an alternative to the traditional trial schedule: beginning the trial day at 8:00 or 8:30 a.m. and concluding between 1:00 and 2:00 p.m. with no lunch break and only two short rest breaks. The schedule is demanding, but some favor it. A compressed schedule focuses the attention of jurors rather than letting it grow lethargic during long or frequent recesses and post-lunch doldrums. Concluding the trial day early reserves a useable part of the day for other business and, for parent-jurors, better conforms to the schedule of school-age children. A compressed schedule is not suited to all trials, but judges might consider whether it better meets the needs of participants in a particular case.

¶123 Other factors the judge may want to consider in developing the trial schedule:

- ➢ Encourage settlement negotiations to conclude before summoning jurors. Settlement should always be encouraged, but jurors need not sit idly by during negotiations.
- ➢ Conduct business not affecting the jury, such as trial management issues, law and motion matters and administrative responsibilities, before jurors arrive or after they leave.
- ➢ Inquire about the relative inconvenience to jurors and parties to stay late for a witness, especially an expert witness, or to return the next day.
- ➢ Direct counsel to prepare final instructions before the close of evidence or release jurors until the next day.
- ➢ If the trial is to be a long one, consider periodic half-day recesses to permit jurors to attend to their needs.

B) STRESS

¶124 What for judges and lawyers is a frequent occurrence is for jurors a rare, perhaps once-in-a-lifetime event. Jurors sit in judgment of witnesses and parties, decide what occurred, decide the legal consequences of those events and recognize the pressure to make the correct decisions. In addition to these significant and unfamiliar responsibilities jurors have no control of the trial and little predictability. Jurors are required to profess to the public their acts, interests, opinions, circumstances, associations and biases; they are required to work in close contact with strangers. At the same time the trial process removes the most significant of the support structures people typically rely upon for dealing with stress: talking with others.

¶125 Although not expressed in so many words, many of the Committee's recommendations will help to reduce the stress of jurors by providing them with more information about the process and the case, more predictability about the trial and at least a modest amount of control. In addition to these earlier recommendations, the Committee offers the following suggestions for judges to consider.

¶126 Meeting with the jury after the trial concludes can be of great help to them. The judge, of course, cannot comment upon the case, and many jurors want to know whether they reached the right verdict. The judge can give the simple assurance that, as long as the jurors were conscientious and deliberative, they did the right thing and justice was served regardless of the outcome. The judge can inform the jurors they are free to discuss the case or not as they individually choose: that the lawyers or the media may make inquiries, which the jurors are free to accept or decline.

¶127 Even mild symptoms of post-trauma stress are probably rare for jurors, but in trials with gruesome evidence or high emotional content or trials that attract public attention, jurors may experience some symptoms. Even a juror experienced in hiring and firing people may be affected by the weight of imposing a death sentence. Meeting with jurors after the trial is probably sufficient in most high stress cases. The judge might convey to jurors that normal symptoms of stress include disrupted sleeping and eating patterns, agitation, and doubt. In the rare case of extreme stress, the judge might consider inviting a local psychologist, psychiatrist or other professional to help jurors identify symptoms and deal with them. The Administrative Office of the Courts should work with the courts to develop volunteer resources to assist jurors with extreme symptoms of stress.

¶128 Some trials, both civil and criminal, require the parties to introduce gruesome evidence, either by testimony or photographs. The judge can assist jurors in dealing with the stress of gruesome evidence by warning jurors in advance, perhaps during voir dire and again prior to introduction. The judge might observe the jurors' reaction to the evidence and permit a recess if warranted. The judge might consider the timing of the evidence, so it is not the last image with which jurors are sent home and not introduced immediately before or after lunch. The judge might consider the length of time the evidence remains in the jurors' view. Jurors need a reasonable opportunity to observe the evidence, but the judge can control against an over-long display. Under the rules of evidence, the judge can consider whether the evidence is merely cumulative or shows new facts. All of these devices permit the parties to present their case without unduly burdening the jurors.

C) JUROR EVALUATIONS

¶129 Jurors selected to try the case have the opportunity to evaluate the judge's performance and the results of those evaluation eventually are published in the voter information pamphlet when the judge stands for retention election. All jurors should have the opportunity to evaluate the jury trial system in general. Jurors represent a wealth of information about the adequacy of the facilities and information, the respect with which they were treated, and suggestions for improvement. The Committee recommends the Administrative Office of the Courts survey jurors or a representative sampling of them about their satisfaction with jury service. The Administrative Office of the Courts should evaluate the information, identify areas for needed improvement and raise suggested changes with the Board of District Court Judges, the Board of Justice Court Judges and the Judicial Council.

D) JUROR BILL OF RIGHTS

¶130 As part of its jury study, Arizona developed a juror bill of rights that has not been promulgated despite the fact the particulars are merely a summary of other reforms, most of which have been implemented. [41] The Committee sees no purpose to a juror bill of rights: such a document could not be a body of enforceable law and could serve, at best, as an aspirational creed. Even a creed suggests a belief in a single best method, and, while some elements of this report might find uniform application, the experience of this Committee is that, generally, one size does not fit all. In a much more detailed expression of principles than a bill of rights could ever achieve, the Committee has recommended steps to better integrate jurors into their role as decision makers. Many of those recommendations recognize the legitimate and significant discretion of the

judge to apply the recommendation in an appropriate manner and in appropriate circumstances. To the extent an encapsulated version is needed, the executive summary will serve.

7) STANDING COMMITTEE

¶131 After a three year effort, the Committee concludes there is a need for a standing committee on juries. Continuing education of judges, lawyers and citizens appears to be the single most important ingredient to improving the jury trial system. That education effort likely will not occur without an institutional presence to plan it, coordinate it and support it. Further, the recommendations of this report, if adopted, put in motion several continuing studies. The data thus generated will need to be evaluated to determine whether modifications to the jury trial system are needed and if so the nature of those changes. Next, as widely as this Committee spread its net, it did not, indeed it could not, exhaust the topics contained under the rubric, improving jury service. This Committee did not reach care for the dependents of jurors, a web site for jurors, payment of fees to employers of jurors in exchange for the jury fee, exempting jury fees from state tax and a variety of other important and timely issues. Finally, academic research and the jury improvement efforts in Utah and around the country will continue to raise new issues, which a broad-based standing committee is best suited to consider.

¶132 To continue the effort to improve jury service, the Judicial Council should create a broadly representative standing committee with nine members: one lawyer each from criminal prosecution and defense and civil plaintiffs and defense, a representative of the bar commission, a justice court judge and three district court judges. Recruiting former jurors to serve as public members would be beneficial, but continued participation in committee work is extremely taxing, especially for one whose daily life is not directly affected by the issues. The committee, as part of its research on issues, should invite jurors to offer their insights or conduct surveys or focus groups of jurors.

¶133 Many sections of this report offer the opportunity for a standing committee to supervise or coordinate implementation of recommendations:

- ➢ Educate judges, lawyers and the public about jury service.
- ➢ Improve jury source lists.
- ➢ Develop, implement and analyze information of about juror demographics and juror yield.
- ➢ Maintain a library of juror questionnaires and voir dire videos.
- ➢ Assist with efforts towards plain language jury instructions.
- ➢ Develop resources to assist jurors with stress.
- ➢ Develop, implement and analyze surveys of juror satisfaction.

¶134 In addition, a standing committee should be charged with maintaining current research on jury topics, describing problems and issues raised by its research and recommending solutions:

- ➢ Consider academic writings on jury topics and the jury improvement efforts of states.
- ➢ Identify topics of interest to jurors, judges and lawyers in which improvements can be made.

8) PROPOSED STATUTORY AMENDMENTS

78-46-7. Persons competent to serve as jurors - Persons not competent to serve as jurors.

(1) A person is competent to serve as a juror if the person is:

(a) a citizen of the United States;

(b) over the age of 18 years;

(c) a resident of the county; and

(d) able to read, speak, and understand the English language.

(2) A person who has been convicted of a felony that has not been expunged is not competent to serve as a

juror.

78-46-12. Qualified jury list - Term of availability - Juror qualification form - Content - Completion - Penalties for failure to complete or misrepresentation - Joint jury list for court authorized.

(1) Prospective jurors shall be selected at random from the master jury list and, if qualified, placed on the qualified jury list. A prospective juror shall remain on the qualified jury list for no longer than six months or for such shorter period established by rule of the Judicial Council. The qualified jury list may be used by all courts within the county, but no person shall be summoned to serve as a juror in more than one court.

(2) The Judicial Council shall by rule govern the process for the qualification of jurors and the selection of qualified jurors for voir dire.

(3) The state court administrator shall develop a standard form for the qualification of jurors. The form shall include:

(a) the name, address, and daytime telephone number of the prospective juror;

(b) questions suitable for determining whether the prospective juror is competent under statute to serve as a juror; and

(c) the person's declaration that the responses to questions on the qualification form are true to the best of the person's knowledge~~; and~~

~~(d) a statement that a willful misrepresentation of a material fact is punishable as a class C misdemeanor~~.

(4) Any prospective juror who fails to return a completed form as instructed shall be directed by the court to appear before the clerk to complete the form. A person who fails to appear is subject to the procedures and penalties in Section 78-46-20.

(5) Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror is guilty of a class C misdemeanor.

78-46-15. Excuse from jury service.

(1) The court, upon request of a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or by interview with the prospective juror, or by other competent evidence, whether the prospective juror should be excused from jury service. The clerk shall enter this determination in the records of the court.

(2) A person may be excused from jury service by the court, at its discretion, upon a showing of ~~a physical or mental disability rendering the person incapable of jury service,~~ undue hardship, extreme inconvenience, ~~or~~ public necessity or that the person is incapable of jury service. The excused period may be for any period the court deems necessary.

78-46-19. Limitations on jury service.

In any two-year period, a person shall not be required:

(1) to serve on more than one grand jury;

(2) to serve as both a grand and trial juror; or

(3) to attend court for prospective jury service as a trial juror more than ~~five~~ one court ~~days~~ day, except if necessary to complete service in a particular case.

9) PROPOSED RULE AMENDMENTS

Utah Rule of Civil Procedure 47. Jurors.

(a) Examination of jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper. Prior to examining the jurors, the court may permit the parties or their attorneys to make a preliminary statement of the case or may itself make such a statement. In the former event, the court shall notify the parties in advance.[42]

(b) Alternate jurors. The court may direct that ~~jurors in addition to the regular panel be called and impanelled to sit as~~ alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be ~~drawn~~ selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, ~~facilities,~~ and privileges as ~~the~~ principal jurors. An alternate juror who does not replace a principal juror shall be discharged ~~after~~ when the jury retires to consider its verdict unless the parties stipulate otherwise and the court approves the stipulation. The court may withhold from the jurors the identity of the alternate jurors until the alternate jurors are discharged. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed. ~~The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.~~

(c) Challenge defined; by whom made. A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.

(d) Challenge to panel; time and manner of taking; proceedings. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be stated on the record, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(e) Challenges to individual jurors; number of peremptory challenges. The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges, except as provided under Subdivisions (b) and (c) of this rule.

(f) Challenges for cause~~; how tried~~. ~~Challenges for cause may be taken on one or more of the following grounds:~~ A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water, power, light or other services rendered to such resident.

(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except ~~his~~ interest as a member or citizen of a municipal corporation.

~~(6) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion , act impartially and fairly upon the matter to be submitted to him.~~

(6) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

~~Any challenge for cause shall be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of such challenge.~~

(g) Selection of jury. The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following methods for selection are not exclusive.

(1) Strike and replace method. The ~~clerk shall draw by lot and call~~ court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy ~~before further challenges are made~~, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, ~~in the order called,~~ and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, ~~in the order in which they appear on the list,~~ including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge

may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(h) Oath of jury. As soon as the jury is completed an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and a true verdict rendered according to the evidence and the instructions of the court.

(i) Proceedings when juror discharged. If, after ~~the impanelling of~~ impaneling the jury and before verdict, a juror becomes unable or disqualified to perform ~~his duty~~ the duties of a juror and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) View by jury. When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

(k) Separation of jury. If the jurors are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(l) Deliberation of jury. When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having ~~them under his charge must not suffer~~ charge of them must not make or allow to be made any communication to ~~be made to them , or make any himself,~~ them with respect to the action, except to ask them if they have agreed upon their verdict, and ~~he~~ the officer must not, before the verdict is rendered, communicate to any person the state of ~~their~~ deliberations or the verdict agreed upon.

(m) ~~Papers taken by jury.~~ Exhibits taken by jury; notes. Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits ~~and all papers~~ which have been received as evidence in the cause, except exhibits of unusual size, weapons, contraband, depositions or ~~copies of such papers~~ such other exhibits as ought not, in the opinion of the court, to be ~~taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person~~ in the possession of the jury. The court shall permit the jury to view such exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials. The court shall instruct

the jury on the appropriate taking and use of notes.

(n) Additional instructions of jury. After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

(o) New trial when no verdict given. If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(p) Court deemed in session pending verdict; verdict may be sealed. While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(q) Declaration of verdict. When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and the verdict rendered by their ~~foreman;~~ foreperson; the verdict must be in writing, signed by the ~~foreman,~~ foreperson, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is ~~his~~ the juror's verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.

(r) Correction of verdict. If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

Utah Rule of Civil Procedure 51. Instructions to jury; objections.

(a) Preliminary instructions. After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the cause of action, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to the jury. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.

(b) Interim written instructions. During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.

(c) Final instructions. At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish

counsel with a copy of its proposed instructions, unless the parties ~~stipulate that such instructions may be given orally or otherwise~~ waive this requirement. Final instructions shall be in writing and a copy provided to the jury.

(d) Objections to instructions. ~~If the instructions are to be given in writing, all objections thereto must~~ Objections to preliminary and final instructions shall be made before the instructions are given to the jury~~; otherwise, objections~~. Objections to interim instructions may be made ~~to the instructions~~ after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. ~~No party may assign as error the giving or the failure to give an instruction unless he objects thereto.~~ Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In objecting to the giving of an instruction, a party ~~must state distinctly~~ shall identify the matter to which ~~he objects~~ the objection is made and the grounds for ~~his~~ the objection. ~~Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving of or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made out of the hearing of the jury.~~

(e) Arguments. Arguments for the respective parties shall be made after the court has ~~instructed~~ given the jury its final instructions. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

Utah Rule of Criminal Procedure 17. The trial.

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

(1) misdemeanor cases when defendant is in custody;

(2) felony cases when defendant is in custody;

(3) felony cases when defendant is on bail or recognizance; and

(4) misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress

with any number of jurors less than otherwise required.

(g) After the jury has been ~~impanelled~~ impaneled and sworn, the trial shall proceed in the following order:

(1) The charge shall be read and the plea of the defendant stated;

(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;

(3) The prosecution shall offer evidence in support of the charge;

(4) When the prosecution has rested, the defense may present its case;

(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;

(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and

(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

(j) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(k) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits ~~and papers~~ which have been received as evidence, except ~~depositions; and each juror may also take with him any notes of the testimony or other proceedings taken by himself, but none taken by any other person~~ exhibits of unusual size, weapons, contraband, depositions or such other exhibits as ought not, in the opinion of the court, to be in the possession of the jury. The court shall permit the jury to view such exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials. The court shall instruct the jury on the appropriate taking and use of notes.

(l) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed

upon.

(m) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(n) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(o) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Utah Rule of Criminal Procedure 18. Selection of the jury.

(a) The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following procedures for selection are not exclusive.

(1) Strike and replace method. The ~~clerk shall draw by lot and call~~ court shall summon the number of the jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy ~~before further challenges are made~~, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, ~~in the order in which they appear on the list,~~ including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(b) The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant. Prior to examining the jurors, the court may permit the parties or their attorneys to make a preliminary statement of the case or may itself make such a statement. If the former event, the court shall notify the parties in advance of trial.[43]

(c) A challenge may be made to the panel or to an individual juror.

(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

(i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.

(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or ~~recorded by the reporter .~~ made upon the record. It shall specifically set forth the facts constituting the grounds of the challenge.

(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense.

(d) A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) ~~The~~ A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds~~;~~. On its own motion the court may remove a juror upon the same grounds.

(1) want of any of the qualifications prescribed by law;

(2) any mental or physical infirmity which renders one incapable of performing the duties of a juror;

(3) consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted;

(4) the existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because ~~he~~ the juror is indebted to or employed by the state or a political subdivision thereof;

(5) having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by ~~him~~ the defendant in a criminal prosecution;

(6) having served on the grand jury which found the indictment;

(7) having served on a trial jury which has tried another person for the particular offense charged;

(8) having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;

(9) having served as a juror in a civil action brought against the defendant for the act charged as an offense;

(10) if the offense charged is punishable with death, the entertaining of such conscientious opinions about the death penalty as would preclude the juror from voting to impose the death penalty following conviction regardless of the facts;

(11) because ~~he~~ the juror is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense;

(12) because ~~he~~ the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury;

(13) having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged; or

~~(14) that a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.~~

(14) conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(f) Peremptory challenges shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(g) The court may direct that alternate jurors be ~~impanelled.~~ impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, ~~are, or become,~~ become unable or disqualified to perform their duties. ~~The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen.~~ Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and ~~enjoy the same privileges as regular jurors.~~ shall have the same functions, powers, and privileges as principal jurors. An alternate juror who does not replace a principal juror

shall be discharged when the jury retires to consider its verdict. The identity of the alternate jurors may be withheld until they are discharged. If one or two alternate jurors are called, the prosecution and defense are entitled to one peremptory challenge in addition to those otherwise allowed.

~~(h) A statutory exemption from service as a juror is a privilege of the person exempted and is not a ground for challenge for cause.~~

~~(i)~~(h) When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

Utah Rule of Criminal Procedure 19. Instructions.

(a) After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the alleged crime, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to the jury. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.

(b) During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.

~~(a)~~ (c) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties ~~stipulate that such instructions may be given orally, or otherwise~~ waive this requirement. Final instructions shall be in writing and a copy provided to the jury.

~~(b)~~ (d) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused.

~~(c)~~ (e) Objections to preliminary and final instructions shall be made before the instructions are given to the jury. Objections to interim instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. ~~No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly~~ In stating the objection the party shall identify the matter to which ~~he objects~~ the objection is made and the ground of ~~his~~ the objection. ~~Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.~~

~~(d)~~ (f) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence,

it shall instruct the jury that they are the exclusive judges of all questions of fact.

(e) Arguments of the respective parties shall be made after the court has ~~instructed~~ given the jury its final instructions. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court.

Proposed Advisory Committee Note to URCP 47 and URCrP 18.

The Utah Supreme Court has noted a tendency of trial court judges to rule against a challenge for cause in the face of legitimate questions about a juror's biases. The Supreme Court limited the following admonition to capital cases, but it is a sound philosophy even in trials of lesser consequence.

> [W]e take this opportunity to address an issue of growing concern to this court. We are perplexed by the trial courts' frequent insistence on passing jurors for cause in death penalty cases when legitimate concerns about their suitability have been raised during voir dire. While the abuse-of-discretion standard of review affords trial courts wide latitude in making their for-cause determinations, we are troubled by their tendency to "push the edge of the envelope," especially when capital voir dire panels are so large and the death penalty is at issue. Moreover, capital cases are extremely costly, in terms of both time and money. Passing questionable jurors increases the drain on the state's resources and jeopardizes an otherwise valid conviction and/or sentence. ... If a party raises legitimate questions as to a potential juror's beliefs, biases, or physical ability to serve, the potential juror should be struck for cause, even where it would not be legally erroneous to refuse. State v. Carter, 888 P.2d 629 (Utah 1995).

In determining challenges for cause, the task of the judge is to find the proper balance. It is not the judge's duty to seat a jury from a too-small venire panel or to seat a jury as quickly as possible. Although thorough questioning of a juror to determine the existence, nature and extent of a bias is appropriate, it is not the judge's duty to extract the "right" answer from or to "rehabilitate" a juror. The judge should accept honest answers to understood questions and, based on that evidence, make the sometimes difficult decision to seat only those jurors the judge is convinced will act fairly and impartially. This higher duty demands a sufficient venire panel and sufficient voir dire. The trial court judge enjoys considerable discretion in limiting voir dire when there is no apparent link between a question and potential bias, but "when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears. The trial court must allow such inquiries." The court should ensure the parties have a meaningful opportunity to explore grounds for challenges for cause and to ask follow-up questions, either through direct questioning or questioning by the court.

The objective of a challenge for cause is to remove from the venire panel persons who cannot act impartially in deliberating upon a verdict. The lack of impartiality may be due to some bias for or against one of the parties; it may be due to an opinion about the subject matter of the action or about the action itself. The civil rules of procedure have a few - and the criminal rules many more - specific circumstances, usually a relationship with a party or a circumstance of the juror, from which the bias of the juror is inferred. In addition to these enumerated grounds for a challenge for cause, both the civil rules and the criminal rules close with the following grounds: formulation by the juror of a state of mind that will prevent the juror from acting impartially. However, the rules go on to provide that no person shall be disqualified as a juror by reason of having formed an opinion upon the matter if it satisfactorily appears to the court that the person will, notwithstanding that opinion, act impartially.

The amendments focus on the "state of mind" clause. In determining whether a person can act impartially, the court should focus not only on that person's state of mind but should consider the totality of the circumstances. These circumstances might include the experiences, conduct, statements, opinions, or associations of the juror. Rather than determining that the juror is "prevented" from acting impartially, the court should determine whether the juror "is not likely to act impartially." These amendments conform to the directive of the Supreme Court: If there is a legitimate question about the ability of a person to act impartially, the court should remove that person from the panel.

There is no need to modify this determination with the statement that a juror who can set aside an opinion based on public journals, rumors or common notoriety and act impartially should not be struck. Having read or heard of the matter and even having an opinion about the matter do not meet the standard of the rule. Well-informed and involved citizens are not automatically to be disqualified from jury service. Sound public policy supports knowledgeable, involved citizens as jurors. The challenge for the court is to evaluate the impact of this extra-judicial information on the ability of the person to act impartially. Information and opinions about the case remain relevant to but not determinative of the question: "Will the person be a fair and impartial juror?"

In stating that no person may serve as a juror unless the judge is "convinced" the juror will act impartially, the Committee uses the term "convinced" advisedly. The term is not intended to suggest the application of a clear and convincing standard of proof in determining juror impartiality, such a high standard being contrary to the Committee's objectives. Nor is the term intended to undermine the long-held presumption that potential jurors who satisfy the basic requirements imposed by statutes and rules are qualified to serve. Rather, the term is intended to encourage the trial judge to be thorough and deliberative in evaluating challenges for cause. Although not an evidentiary standard at all, the term "convinced" implies a high standard for judicial decision-making. Review of the decision should remain limited to an abuse of discretion.

This new standard for challenges for cause represents a balance more easily stated than achieved. These amendments encourage judges to exercise greater care in evaluating challenges for cause and to resolve legitimate doubts in favor of removal. This may mean some jurors now removed by peremptory challenge will be removed instead for cause. It may also mean the court will have to summon more prospective jurors for voir dire. Whether lawyers will use fewer peremptory challenges will have to await the judgment of experience.

Rule 4-202.02. Records classification.

Intent:

To classify records created or maintained by the judicial branch.

Applicability:

This rule applies to all courts of record and not of record and to the Administrative Office of the Courts.

Statement of the Rule:

....

(4) Private judicial records. The following judicial records are private:

(A) sealed divorce records;

(B) driver's license histories;

(C) records involving the commitment of a person under Utah Code, Title 62A, Chapter ~~12.~~12; and

(D) records containing the name, address or telephone number of a juror or prospective juror or other information from which a juror or prospective juror could be identified. However, after the judge has discharged the jurors, the names of the jurors who tried the case shall be a public record, unless a juror requests that his or her name remain a private record and the judge finds that the interests favoring privacy outweigh the interests favoring public access.

....

Rule 4-404. Jury selection and service.

Intent:

To establish the process for transition from the master jury lists maintained by the county clerks and those maintained by the Judicial Council.

To establish a uniform procedure for jury selection, qualification, and service.

To establish administrative responsibility for jury selection.

To ensure that jurors are well informed of the purpose and nature of the obligations of their service at each stage of the proceedings.

Applicability:

This rule shall apply to all trial courts.

Statement of the Rule:

. . . .

(7) Summons from the qualified jury list.

(A) After consultation with the judges or the presiding judge of the court, the clerk of the court shall determine the number of jurors needed for a particular day. The number of prospective jurors summoned should be based upon the number of panels, size of the panels, any alternates, the total number of peremptory challenges plus the anticipated number of prospective jurors to be excused or deferred from service or removed for cause. ~~(B)~~ The clerk shall summon the smallest number of prospective jurors reasonably necessary to select a trial jury. ~~The clerk shall summon a sufficient number of prospective jurors so that no more than 20 prospective jurors appear for civil cases of $20,000 or less and misdemeanor cases; and~~

~~(C)~~(B) The judge may direct that additional jurors be summoned if, because of the notoriety of the case or other exceptional circumstances, the judge anticipates numerous challenges for cause.

~~(D)~~(C) (i) The clerk of the court, or other officer of the court at the direction of the clerk, shall summon jurors from the qualified jury list in the random order in which they appear on the qualified jury list.

(ii) The summons may be by first class mail delivered to the address provided on the juror qualification form or by telephone.

(iii) Mailed summonses shall be on a form approved by the court executive. The summons shall contain a warning regarding the penalty for failure to obey the summons. The summons may direct the prospective juror to appear at a date, time, and place certain or may direct the prospective juror to telephone the court for further information. The summons shall direct the prospective juror to present the summons for payment. The summons may contain other information determined to be useful to a prospective juror.

(iii) If summons is made by telephone, the clerk shall follow the procedures of paragraph (10) of this rule.

. . . .

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11) STUDY TOPICS

1) In Court Procedures
   - A) Voir Dire
     - i) Develop statement of purpose of voir dire so judges might better determine propriety of questions
     - ii) Who asks questions?
     - iii) Routine juror questionnaires prior to day of trial
     - iv) Case specific juror questionnaires prior to day of trial
     - v) Ensure jurors are treated with respect & regard for their privacy
     - vi) Preliminary opening statements prior to voir dire
     - vii) Training judges in conducting voir dire
   - B) Juror Notes and Questions
     - i) Establish right of jurors to take and keep notes and ensure jurors are advised of the right to do so
     - ii) Establish the right of jurors to ask questions and ensure jurors are advised of the right to do so
     - iii) Develop process by which jurors ask questions of a witness about evidence; of a judge about instructions
   - C) Jury Orientation & Instructions
     - i) Pretrial instructions
     - ii) Interim instructions during trial
     - iii) Juror questions about instructions
     - iv) Plain English instructions
     - v) Case-specific instructions
     - vi) Final instructions prior to closing arguments
     - vii) Written instructions
     - viii) Is orientation video being shown uniformly?
     - ix) What is the nature and content of local orientation programs?
     - x) Improve orientation information
   - D) Presentation of Evidence
     - i) Parties provide jurors with notebooks for keeping trial materials organized
       - ◊ witness list & photos
       - ◊ criminal charges
       - ◊ pleadings & documents

- ◊ evidence
- ◊ instructions

ii) Improve management of trial exhibits
iii) Use deposition summaries
iv) Develop procedures for periodic summaries during trial
v) Develop use of modern technology in the presentation of evidence
vi) Interim summaries

E) Peremptory Strikes
i) Eliminate/Limit
ii) Enforce Batson standards (race, ethnic and gender-neutral basis for peremptory strikes
iii) Method of exercising
- ◊ Struck
- ◊ Strike and replace
- ◊ White's Method

F) Trial Schedules
i) Develop preferred trial schedule designed for most jurors
ii) Develop process for inquiring about a trial schedule for a particular jury
iii) Inform jurors of whatever schedule is set and keep to the schedule
iv) Express authority for the judge to set reasonable time limits for the different stages of the trial
v) Conclude as many motions and evidentiary issues as possible before jury selection
vi) Do not keep jurors waiting for instructions to be prepared (prepare prior to close of evidence or release jurors until the next day)
vii) Maximize contiguous trial times and days
viii) Minimize trial interruptions by law & motion calendars and routine court business
ix) Develop guidelines for severance of parties or claims especially in lengthy or complex trials

G) Jury Deliberations
i) Process to answer questions that arise during deliberations
ii) Hold alternate jurors until a verdict is announced and jury discharged
iii) Allow alternate civil jurors to deliberate and vote
iv) Judge to set deliberation schedule and advise jurors
v) Process to allow jurors to identify point on which there is an impasse, permit further argument or instruction

H) Discussion of Evidence
i) Develop rule change and instruction that would permit jurors to discuss the evidence prior to deliberation
ii) Develop circumstances under which discussion may occur
iii) Develop limits to the discussion

I) Removal from the Jury Panel for Cause
i) Eliminate URCrP 18(h) regarding exemptions because Utah has no exemptions from jury service
ii) Standard for impartiality of jurors

2) Composition of Jury

A) Random Selection Procedures
i) Random stratified selection
ii) Striking grossly unrepresentative juries
iii) Obtain demographic information (as an assist to making juries representative)
iv) Summon jurors on regional (Judicial District) basis

B) Jury Source Lists
i) Eliminate data errors in current juror source lists
ii) Use additional juror source lists

C) Notification and Summoning Procedures
i) Improve effort to pursue no shows (including failure to return qualification form)
- ◊ Locator services

- ◊ Process servers
- ◊ County sheriff
- ◊ Penalty for failure to respond/appear

ii) Combine qualification and summons process
iii) Develop uniform qualification and summons process
iv) Provide more useful information to the jurors as part of qualification and/or summons
v) Obtain voir dire information as part of qualification process

D) Eligibility for Jury Service
i) Should mental or physical disability be a disqualification or grounds for requesting to be excused?
ii) Is the need to read, speak, and understand English a valid minimum qualification?

E) Excuse and Deferral
i) Develop written standards and procedural guidelines for disqualification, excuse and deferral
ii) Report and monitor excuses and deferrals

F) Term of and Availability for Jury Service
i) Limit eligibility dates
ii) One day/One trial
iii) Improve "yield" of jury summons to enable fewer people to be summoned

G) Opportunity for Jury Service
i) Sufficiency of non-discrimination law and practice

3) Services for Jurors
A) Juror Compensation
i) Multi-tier payments to reflect longer service
ii) Contributions by employers

B) Juror Stress
i) Workers' compensation claim
ii) Victim reparations claim
iii) Pro bono program
iv) "Debriefing" by judge
v) Advise of right to talk/not talk to parties and media about the case

C) Juror Bill of Rights
i) Statement of rights that would attach and be honored throughout jury service

D) Child Care for Jurors
i) On site
ii) Reimbursement of expenses

4) Administration
A) Jury Facilities
B) Public education programs about jury service
C) Protect juror identifying information from disclosure
D) Monitoring the Jury System
i) Develop appropriate performance measures and records for measurement
ii) Juror yield (Too many jurors called and not used)
iii) Obtain demographic information
iv) Disqualification, excuse, deferral
v) Obtain information regarding practice and compare to law

E) Juror Comments
i) System to obtain jurors' suggestions, comments and complaints

12) A GUIDE TO JURY DELIBERATIONS

Introduction

You have just been instructed on the law in the trial and you are ready to begin deliberating. Before you begin, please take the time to read this note for some tips on how to organize yourselves, how to consider the evidence, and how to reach a verdict. You are free to deliberate in any way you wish. These are suggestions to help you proceed with the deliberations in a smooth and timely way.

Before you start, it would be useful to think about the following principles:

- ➢ Respect each other's opinions and value the different viewpoints each of you brings to this case.
- ➢ Be fair and give everyone a chance to speak.
- ➢ Do not be afraid to speak up and express your views.
- ➢ It is okay to change your mind.
- ➢ Listen carefully to one another. Do not let yourself be bullied into changing your opinion, and do not bully anyone else.
- ➢ Do not rush into a verdict to save time. The people in this case deserve your complete attention and thoughtful deliberation.
- ➢ Follow the judge's instructions about the law, and you will do a good job.

Getting Started

Q. How do we start?

A. At first, you might want to:

- ➢ Take some time to get to know one another.
- ➢ Talk about your feelings and what you think about the case.
- ➢ Talk about how to handle deliberations and lay out some rules to guide you.
- ➢ Talk about how to handle voting.

Selecting the Presiding Juror

Q. What qualities should we consider when choosing the presiding juror?

A. Suggestions include someone who:

- ➢ Is a good discussion leader.
- ➢ Is fair.
- ➢ Is a good listener.
- ➢ Is a good speaker.
- ➢ Is organized.

Q. What are the responsibilities of the presiding juror?

A. The presiding juror should:

- ➢ Encourage all jurors to join in discussions.
- ➢ Keep the discussions focused on the evidence and the law.
- ➢ Tell the court when there are any questions or problems.
- ➢ Tell the court when you have reached a verdict.

Q. Does that mean the presiding juror's opinions are more important than mine?

A No. The opinions of each juror count equally.

Getting Organized

Q. Are there any rules to tell us how to deliberate?

A. No. You could:

- ➢ Go around the table, one by one, to talk about the case.
- ➢ Have jurors speak up anytime, when they have something to say.
- ➢ Encourage everyone to talk by asking, "Does anyone else have anything to add?"
- ➢ Show respect to the other jurors by looking at the person speaking.
- ➢ Take notes so you do not forget important points.
- ➢ Have someone write down key points, perhaps on a flip chart, so everyone can see them.

Discussing the Evidence and the Law

Q. What do we do now?

A. First, review the judge's instructions on the law because the instructions tell you what to do.

Q. Is there a set way to examine and weigh the evidence and to apply the law?

A. The judge's instructions will tell you if there are special rules or procedures you should follow. Otherwise, you are free to conduct your deliberations in whatever way is helpful. Here are several suggestions:

- ➢ Read the judge's instructions that define each charge or claim.
- ➢ List each element that makes up that charge or claim.
- ➢ For each element, review the evidence, both the exhibits and witness testimony, to see if each element has been established by the evidence.
- ➢ If there is a lot of evidence, list each piece of evidence next to the element(s) it applies to.
- ➢ Discuss each charge or claim, one at a time.
- ➢ Vote on each charge or claim.
- ➢ Fill out the verdict form(s) given to you by the judge.

Q. What if someone is not following the instructions, refuses to deliberate, or relies on information outside of the evidence?

A. This is a violation of a juror's oath and the presiding juror should tell court.

Voting

Q. When should we take the first vote?

A. There is no best time. But, if you spend a reasonable amount of time considering the evidence and the law and listening to each other's opinions, you will probably feel more confident and satisfied with your verdict than if you rush things.

Q. Is there any correct way to take the vote?

A. No, any way is okay. You might vote by raising your hands, by a written ballot, or by a voice ballot. Whatever method you use, you should express your vote openly to the other jurors.

Q. What if we cannot reach a verdict after trying many times to do so?

A. Ask the judge for advice on how to proceed.

Getting Assistance from the Court

Q. What if we don't understand or are confused by something in the judge's instructions, such as a legal principle or definition?

A. Ask the judge because you must understand the instructions in order to do a good job.

Q. Is there any other information we can ask the judge for?

A. Yes, to refresh your memory about the evidence, you can:

- ➢ Ask for a list of the witnesses.
- ➢ Ask that the testimony of witnesses be read back.
- ➢ Ask to look at the trial exhibits.

Q. How do we get this information?

A. Write what you need on a piece of paper and have the presiding juror give it to the court official.

Q. Is there any type of information we cannot ask for?

A. Yes, some examples of information you cannot ask for include:

- ➢ Police reports, doctors' reports, etc., that were referred to during the trial, but were not received in evidence as an exhibit.
- ➢ Reports and other information that were not referred to during the trial, but that you assume might be or should be available.
- ➢ There may be some information you ask for that the judge is unable to give you.

The Verdict

Q. After we have reached a verdict and signed the verdict form(s), how do we turn our verdict over to the court?

A. The following steps are usually followed:

- ➢ The presiding juror tells the attending court official that you have reached a verdict.
- ➢ The judge calls everyone, including you, back into the courtroom.
- ➢ The judge or the clerk in the courtroom asks the presiding juror for the verdict.
- ➢ The verdict is read into the record in open court by the judge or by the court clerk.

Q. Will I be asked for my vote in open court?

A. Possibly. The judge may ask for an individual poll of each of you to see if you agree with the verdict. You need only answer "yes" or "no" OR "not guilty" or "guilty" to the question asked by the judge.

Once Jury Duty is Over

Q. After we deliver the verdict, may we speak with others about the case and the deliberations?

A. The judge will inform you about speaking with others. Generally, you do not have to talk to anyone about the case. It is entirely up to you.

Q. How do we know we have done the right thing?

A. If you have tried your best, you have done the right thing. Making decisions as jurors about the lives, events, and facts in a trial is always difficult. Regardless of the outcome of this case, you have performed an invaluable service for the people in this case and for the system of justice in your community. Thank you for your time and thoughtful deliberations.

13) JUROR QUALIFICATION QUESTIONNAIRE

TERM OF JURY SERVICE: FROM _____ TO _____
If you have any questions, call ###-###-### TTY: ###-###-###
Complete and return to the Court within 10 days of receipt.

Dear _____ County Citizen:

Your name has been drawn at random from a list of all adult citizens of this county for possible jury service. Please complete Parts 1 and 2 of this form. If you need to be excused from jury service, either permanently or temporarily, please complete Part 3. Then sign the form in Part 4 and return it to the court within 10 days. Part 5 contains information about your privacy rights.

The court will determine whether you meet the qualifications for jury service and whether your request to be excused is granted. If you are qualified, the court clerk will notify you by written summons or by telephone call of the date, time, and place for you to appear. You do not need to appear unless you are summoned. Jury service is available to all qualified individuals with disabilities. If you have a disability and require accommodation, contact the court after being summoned. Your employer may not dismiss you or threaten your employment if you attend court for jury service. You may return this form by fax or mail. Instructions are at the bottom of the page. Thank you for your prompt response.

PART 1. NAME, ADDRESS, & PHONE

_____
Name

_____
Mailing Address

_____
City State Zip

_____
Street Address (If different)

_____
City State Zip

Daytime Phone: _____

Evening Phone: _____

PART 2. QUALIFICATIONS

Yes	No	
		1. Have you ever been convicted of a felony that has not been expunged? If yes, please give name of court and date of conviction.

Yes No 2. Have you served on jury duty in Utah within the last 24 months? If yes, please provide the name of the court, and the dates of service.

Yes No 3. Are you 18 years of age or older?
Yes No 4. Are you a citizen of the United States?
Yes No 5. Are you a resident of _____ County?
Yes No 6. Are you able to read, speak and understand, or otherwise communicate in, English?

PART 3. EXCUSE FROM JURY SERVICE

A person may be permanently or temporarily excused from jury service upon a showing of undue hardship, extreme inconvenience, public necessity or that the person is incapable of jury service. If you think you should be excused, please circle a, b, or c below and explain under d.

a) I request the court excuse me permanently from all service.
b) I request the court excuse me from service on the following dates: _____.
c) I request the court excuse me from service until the following date: _____.
d) Please explain the reason for the excuse requested in a, b, or c.

For Court Use Only. Qualified _____ Not Qualified _____
Excused _____ Deferred Until _____

PART 4. SIGNATURE

I DECLARE THAT THE FACTS STATED HEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE.

Signature _____ Date: _____

PART 5. NOTICE OF PRIVACY RIGHTS.

Initials

Your address, telephone number and any other identifying information you provide the court automatically are classified as private records. If you are not selected to try a case, your name also is automatically classified as a private record. However, if you are selected to try a case, state law requires your name be a matter of public record unless you request otherwise. If you want your name classified as a private record in the event you are selected to try a case, please initial this box.

TO RETURN BY FAX, DIAL ###-###-####. TO RETURN BY MAIL, FOLD THIS FLAP IN FIRST AND SEAL ALONG EDGE WITH TAPE.

On behalf of the judges and staff of the district court of _____ County, greetings.

You have been randomly selected as a prospective juror. This means that, if you meet the requirements established by law, you may be called to serve on a jury. The thought of jury service may be a bit unsettling. Because the commitment is outside your routine, there likely will be some inconvenience. But the judges and staff of your district court are committed to showing you every courtesy and respect throughout the process.

Jury service is an opportunity and an obligation shared by all adult citizens. To enable everyone to enjoy that opportunity of jury service, the court draws names randomly from a list of adult citizens of the county. That list is as inclusive as possible. To ensure no one avoids the obligation of jury service, no profession, no trade, no one is automatically exempt from jury service.

You received with this letter a form from the district court that you are required to complete and to return so the court can decide whether you qualify for jury service. Court clerks are available to help you and to answer your questions. Simply call the number on the form. There are limits, but the clerks will work with you to fit jury service into your schedule. No one is exempt from jury service, but you may ask to be excused – either temporarily or permanently – because of undue hardship, extreme inconvenience, public necessity or because you are incapable of jury service. If you think you need to be excused, do not hesitate to ask. You will be asked either by the clerk or by the judge to explain your request. If you have a disability, contact the clerk prior to attending court to arrange any necessary accommodations.

If you are called for jury service, you will have to make arrangements with your employer to take leave from work and make arrangements for the care of your children and other dependents. Your employer is prohibited by law from taking or threatening retaliation against you because of jury service. Courts try to be as efficient as possible, but many things are outside of our control, so come prepared to spend some time waiting. Bring a book or perhaps some work with you.

In the end, you might not be called for jury service, but if you are, jury service does not go completely unrewarded. You will be paid $18.50 for the first day you attend court and $49 for each subsequent day you attend. The more important reward, however, is the pride you can take in serving your community. Thank you for your dedicated public service. I hope you are excited by the prospect of jury service. It is an important civic duty and an important civic right.

Sincerely,

Richard C. Howe
Chief Justice
Utah Supreme Court

14) SUMMONS

The District Court of the _____ Judicial District
_____ County

to

_____

Please call the Court.

You have been selected for jury service, but the case may yet settle or be postponed. Please call ###-###-#### (TTY ###-###-####) after 5:00 p.m. on _____ and before 7:00 a.m. on _____ for instructions for your jury group. You are assigned to Jury Group _____. A court clerk or recorded message will instruct you regarding your jury group. If the case is postponed, you may be instructed to call on another day. Make careful note of the instructions. The telephone number may be quite busy, so please call as often as necessary.

If, after calling, you are instructed to appear, please:

- ◊ **Report to the jury assembly room at the courthouse at:**
  Date: _____
  Time: _____
  Address: _____
  Room: _____
- ◊ **Bring this document with you.**
  It qualifies you to receive $18.50 for your first day and $49 for each subsequent day of service.
- ◊ **If you have a disability and require accommodation, contact the court clerk at ###-###-#### (TTY ###-###-####) prior to attending court.**
- ◊ **Make prior arrangements with your employer for your absence from work.**
  Your employer may not dismiss you or threaten your employment if you report for jury service. Your employer may require you to take vacation leave or leave without pay. Your employer may be willing to continue your salary if you turn over your juror fee payment.
- ◊ **Make prior arrangements for the care of your children or other dependents.**
  There are no dependent care facilities at the courthouse.
- ◊ **Dress appropriately for the importance of the proceedings.**
- ◊ **Take public transportation to the courthouse or park in the courthouse parking lot located _____. (Parking at the courthouse lot is validated.)**

_____ _____
Clerk's Name, Deputy Court Clerk Date

15) QUESTIONNAIRE COVER PAGE

Information to Jurors

Under the Constitutions of Utah and of the United States, trials are open to the public, and this includes oral and written questioning of jurors known as *voir dire*. However, information from which you can be located can be kept confidential and your name can be kept confidential until after the trial so the court has developed this cover page to protect your privacy to the fullest extent allowed by law.

Only this cover page contains information that identifies you. This information is classified as a private record. The court clerk will remove this cover page from the questionnaire and provide it to the court and to the lawyers and parties, but to no one else. When you answer questions on the questionnaire do not include any identifying information. The questionnaire is classified as a public record and will be provided to anyone who requests it. If your responses contain no identifying information, the questionnaire released to the public will be anonymous. This may seem elaborate, but it is routine.

The questioning of jurors may include sensitive topics. If you are asked a question that you believe infringes on your privacy, or that you cannot answer fully without revealing information from which you can be identified, you may ask to respond privately in the judge's chambers. The judge, the lawyers and the parties will be present and the interview will be recorded but the public is excluded and the record is private.

The law requires the names of the jurors selected to try the case be made a part of the public record after the trial is over unless you ask that information be kept private. Addresses and telephone numbers of jurors will not be released in any event. The names of jurors not selected to try the case remain private.

Instructions to Jurors

Complete this cover page by recording the information requested below.

Record your court-assigned juror number on the first page of the questionnaire. Answer the questions fully and candidly. Do not record your name or any other information from which you might be identified (such as address, business address, phone number, relationship to a named individual, etc.) in response to any question on the questionnaire. By completing the cover page and questionnaire in this manner, you provide candid information necessary to the court, the lawyers and the parties, and the court can fulfill its obligation to provide public access to that information without compromising your privacy.

Private Juror Identifying Information

Court-Assigned Juror Number: _____
Name: _____
Address: _____

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[1] §78-46-10(1).

[2] A District Court of New Mexico has held that an English language requirement violated the New Mexico Constitution, but the case is based on the particular language of the state constitution: "The right of any Citizen … to … sit upon juries, shall never be restricted or impaired on account of … language … or inability to speak, read or write the English or Spanish languages…." Article VII, Section 3, Constitution of the State of New Mexico. State v. Gonzales, CR-99-169, State v. Mireles, CR -99-442, Third District Court.

[3] See e.g., U.S. v. Benhumar, 658 F.2d 14 (1st Cir. 1981); State v. Gibbs, 1998 Conn. Super. LEXIS 1775 (Conn. 1998).

[4] §78-46-15.

[5] §78-46-3.

[6] For example, if not all courtrooms are wheelchair accessible and a juror requests accommodation for a wheelchair, assemble in the wheelchair accessible courtroom in the first instance, rather than moving from one to the other.

[7] I do solemnly swear/affirm that I will assist ___(Name)___ in a manner common in his/her important personal or business affairs and accepted in normal professional practice and ethics, and that I will not otherwise participate in the trial or in the deliberations of the jury.

[8] Boatright, Robert G., *Improving Citizen Response to Jury Summonses: A Report with Recommendations*, American Judicature Society (1998), p. 122.

[9] This recommendation requires §78-46-12 be amended as that section requires such notice.

[10] Boatright, Robert G., *Improving Citizen Response to Jury Summonses: A Report with Recommendations*, American Judicature Society (1998), p. 121.

[11] *Redding v. Brady*, 606 P.2d 1193, 1195 (Utah 1980)

[12] *In re Globe Newspaper Co*., 920 F.2d 88, 94 (1st Circ. 1990),

[13] *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-13, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1984); *State v. Archuleta*, 857 P.2d 234 (Utah 1993).

[14] *Gannett Co. v. Delaware*, 571 A.2d 735, 750-51 (1990) cert. denied 495 U.S. 918; 110 S. Ct. 1947; 109 L. Ed. 2d 310 (1990).

[15] *In re Disclosure of Juror Names and Addresses*, 592 NW2d. 798, 809 (Mich. App. 1999). Although the Michigan Court of Appeals recognized the possibility of "other interests" that might be considered by the trial court in fashioning appropriate restrictions, the court held that "[p]rivacy concerns alone, unaccompanied by safety concerns, are not sufficient to justify total denial of media access to jurors' names." The court did not indicate whether privacy concerns would be sufficient to deny public access to juror records prior to the verdict, but suggested that a "brief waiting period" might be appropriate. Id. At 809.

[16] See examples cited in *In re Globe Newspaper Co*., supra at 92 fn. 5 (1st Circ. 1990), and *Gannett*, supra at 747. See also former Subsection 78-46-13(5) repealed Laws of Utah Chapter 219 (SB 198).

[17] *State v. Ball*, 685 P.2d 1055 (Utah 1984).

[18] CJA 4-202.02(6)(D).

[19] Protecting the privacy of identifying and locating information other than the juror's name is in keeping with the Drivers Privacy Protection Act, 18 USC 2721, which prohibits states from divulging drivers license data. Utah uses the drivers license list as one of its source lists from which jury pools are formed and obtains its locating information from that list. Although the federal statute establishes an exception for the judiciary's use of drivers license data, the Committee's finds no sound reason to circumvent the principle of privacy established by the federal law.

[20] *Batson v. Kentucky*, 476 US 79 (1986).

[21] For a description of White's method see 7 The Court Management and Administration Report 1, 5 – 7 (March 1996).

[22] *State v. Carter*, 888 P.2d 629, 649 - 50 (Utah 1995).

[23] "[E]ffective voir dire questioning of prospective jurors must not be prevented by a procedure designed to qualify jurors as quickly as possible on the basis of superficial questions and a declaration by each juror that he or she can follow the judge's instructions and decide the case fairly." *State v. Saunders*, 1999 UT 59, ¶34, 371 Utah Adv. Rep. 6.

[24] "[A] juror's statement alone that he or she can decide a case fairly pursuant to the law given by the trial court is not a sufficient basis for qualifying a juror to sit when the prospective juror's answers provide evidence of possible bias and the trial court does not allow further questions designed to probe the extent and the depth of the bias. *State v. Saunders*, 1999 UT 59, ¶36, 371 Utah Adv. Rep. 6.

[25] *State v. Saunders*, 1999 UT 59, ¶43, 371 Utah Adv. Rep. 6

[26] Recommendation 19(b), Juries for the Year 2000 and Beyond – Proposals to Improve the Jury Systems in Washington, D.C.

[27] The version of the rule published by Lexis Law Publishing appears to omit a significant portion of the rule. The rule states that no more than 20 jurors should be summoned for misdemeanors and for civil cases of less than $20,000 but makes no provision for cases over $20,000 nor for felony cases. The published version serves as the base for the Committee's recommended amendments.

[28] Munsterman, G. Thomas, Jury Trial Innovations, National Center for State Court (1997), p.29.

[29] *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection,* by Jose Felipe Anderson, 32 New Eng.L. Rev. 34 (1998), fn. 314. (citations omitted).

[30] Heuer, Larry and Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 Law and Human Behavior 121, 137 - 140 (1994).

[31] *State v. Anderson,* 158 P.2d 127 (Utah 1945).

[32] *State v. Martinez*, 326 P.2d 102 (Utah 1958).

[33] Heuer and Penrod, supra at 143 - 146.

[34] Jurors: The Power of 12. Final Report of the Arizona Supreme Court Committee on More Effective Use of Jurors. (November 1994).

[35] Standard 2, Juror Notebooks, of the ABA Standards for Civil Trial Practice suggests contents and procedures for juror notebooks, which lawyers and judges may consider useful.

[36] The Model Utah Jury Instructions for civil cases are available to judges in a searchable folio database through the Information Technology department of the Administrative Office of the Courts. The text of instructions can be copied from the database to a word processing document, where it can be edited, if necessary, to more closely fit the facts of the case at hand.

[37] Tiersma, Peter Meijes, *Reforming The Language Of Jury Instructions*, 22 Hofstra L. Rev. 37 (1993).

[38] URCP 51; URCrP 19(a).

[39] *Through the Eyes of the Juror: A Manual for Addressing Juror Stress*, National Center for State Courts, (1998), p. 43.

[40] *Behind Closed Doors: A Resource Manual to Improve Jury Deliberations*, American Judicature Society, (1999).

[41] *Enhancing the Jury System: A Guidebook for Jury Reform*, American Judicature Society (1999) P. 23.

[42] Advisory Committee Note: The preliminary statement of the case does not serve the same purpose as the opening statement presented after the jury is selected. The preliminary statement of the case serves only to provide a brief context in which the jurors might more knowledgeably answer questions during voir dire. A preliminary opening statement is not required and may serve no useful purpose in short trials or trials with relatively simple issues. The judge should be particularly attuned to prevent argument or posturing at this early stage of the trial.

[43] Advisory Committee Note: The preliminary statement of the case does not serve the same purpose as the opening statement presented after the jury is selected. The preliminary statement of the case serves only to provide some brief context in which the jurors might more knowledgeably answer questions during voir dire. A preliminary opening statement is not required and may serve no useful purpose in short trials or trials with relatively simple issues. The judge should be particularly attuned to prevent argument or posturing at this early stage of the trial.